(22,152)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 274.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New Jersey, Possessors of the Record of the Proceedings and Judgment in an Action on Writ of Certiorari in which the New York Central & Hudson River Railroad Company is Prosecutor, and the Board of Chosen Freeholders of Hudson County is Defendant, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Errors and Appeals of the State of New Jersey, wherein final judgment upon return from the Supreme Court of the State of New Jersey was rendered on the sixteenth day of June, nineteen hundred and nine, said Court of Errors and Appeals being the highest court of law and equity of said State of New Jersey in which a decision could be had in the action upon writ of certiorari wherein said The New York Central & Hudson River Railroad Company is defendant in error in said Court of Errors and Appeals, and prosecutor below, and the Board of Chosen Freeholders of the County of Hudson is the plaintiff in error in said Court of Errors and Appeals, and the defendant below, which record was, by the judgment of said Court of Errors and Appeals, remitted to you and is now before you in your said Court, whereon judgment has been entered in said Supreme Court of New Jersey, pursuant to and as directed by said judgment of the Court of Errors and Appeals, wherein was drawn in question the validity of a statute of, and an authority exercised under, said State, on the ground of their
b being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, manifest error hath happened, to the great damage of said The New York Central & Hudson River Railroad Company, as by its complaint appears; and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in the said Supreme Court within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the Constitution, laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 9th day of April in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court
of the United States.

c The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Supreme Court of the United States, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, *C. J.* [SEAL.]

[Endorsed:] Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Pltff. in Error, vs. The Board of Chosen Freeholders of the County of Hudson, Deft. in Error. Writ of error. Returnable May 7th, 1910. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

d STATE OF NEW JERSEY,
City of Trenton, ss:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The return of the Justices of the Supreme Court of the State of New Jersey, by virtue of the foregoing writ of error in the action between The New York Central & Hudson River Railroad Company, plaintiff in error, and defendant in error in the New Jersey Court of Errors and Appeals, and prosecutor in certiorari in the Supreme Court of New Jersey; and the Board of Chosen Freeholders of the County of Hudson, defendant in error, and plaintiff in error in said Court of Errors and Appeals, and defendant in certiorari in said Supreme Court of New Jersey, is contained in the record and proceedings hereto attached with all things concerning the same.

In testimony whereof, I have caused the seal of the said New Jersey Supreme Court to be hereunto affixed at the City of Trenton on the 6th day of May, A. D. Nineteen Hundred and Ten.

[Seal of the Supreme Court.]

WM. RICKER, JR.

c New Jersey Court of Errors and Appeals.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Prosecutor, Defendant in Error,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,
Defendant, Plaintiff in Error.

On Error to Supreme Court.

Case.

John Griffin, Attorney of Defendant, Plaintiff in Error.
Vredenburgh, Wall & Carey, Attorneys of Prosecutor, Defendant in Error.

1 NEW JERSEY, *ss:*

[L. S.]

The State of New Jersey to the Board of Chosen Freeholders of the County of Hudson, Greeting:

We being willing for certain reasons to be certified of certain resolutions passed by the Board of Chosen Freeholders of the County of Hudson on or about the sixth day of July, nineteen hundred and five, fixing the rate of ferriage to be charged by the New York Central & Hudson River Railroad Company, lessee in possession of and operating lines of ferries between the railroad terminal of the West Shore Railroad at Weehawken, in the State of New Jersey, and Franklin Street and other places, in the City of New York;

We do command you that the said resolution, together with all things touching and concerning the same in any way, to our Supreme Court at Trenton, on the tenth day of May next you certify and send, together with this writ, so that we may cause to be done thereupon what of right and according to the laws and constitution of the State ought to be done.

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court at Trenton, New Jersey, the first day of May, nineteen hundred and six.

WILLIAM RIKER, JR., *Clerk.*

VREDENBURGH, WALL & VAN WINKLE, *Attorneys.*

I, John P. Egan, Clerk of the Board of Chosen Freeholders of the County of Hudson, do hereby certify that the following are true copies of all resolutions and proceedings touching and concerning the fixing of the rates of ferriage to be charged by the New York Central & Hudson River Railroad Company, lessee in possession of and operating lines of ferries between the railroad terminal
2 of the West Shore Railroad at Weehawken, in the State of New Jersey, and Franklin Street, in the city of New York, as mentioned in the writ of certiorari hereto annexed.

And I do herewith send to the Supreme Court of the State of New Jersey the within writ as therein commanded.

Witness my hand and seal this seventh day of May, nineteen hundred and six.

[L. S.]

JNO. P. EGAN,
Clerk of the Board of Chosen Freeholders of the County of Hudson.

Resolution, Passed May 4, 1905.

By Freeholders DEMPSEY and MCCARTY:

Whereas, under an act of the legislature of the State of New Jersey, entitled "An act concerning ferries," passed February 6, 1799, the Boards of Chosen Freeholders are empowered and directed to fix the rates to be taken at the several ferries within their respective counties, and the same, from time to time, revise, alter, amend, or make anew at their discretion; and

Whereas, by an act entitled "An act to regulate the rates of ferriage at the Hoboken and Jersey City ferries, approved March 10, 1853, the legislature did regulate the rates of ferriage on ferries at Hoboken and Jersey City; therefore, be it resolved,

(1) That this board inquire into the rates of ferriage charged at the several ferries within the County of Hudson outside of the cities of Jersey City and Hoboken.

(2) That this Board hereby fixes Tuesday, May sixteenth, nineteen hundred and five, at three o'clock in the afternoon, at the Court House in the City of Jersey City, at the time and place when and where it will give a hearing to the owners, proprietors, lessees or persons, firms or corporations in the operation, management and control of such ferries operating within the County of Hudson outside of the cities of Jersey City and Hoboken.

3 (3) That the Deputy Clerk of this Board give notice of said hearing to the Weehawken Ferry Company, the Weehawken Transportation Company, the Hudson Connecting Railway Company, the Open Cut and General Warehouse Company, the Guttenberg Ferry Company, the West Shore and Ontario Terminal Company, the New York Central and Hudson River Railroad Company, the West Shore Railroad Company, and such other persons, firms or corporations as may be interested in the operation, management or control of ferries, and ferryboats operating between Weehawken and the City of New York; also the Port Richmond and Bergen Point Ferry Company, its lessees, successors or assigns, or other persons, firms or corporations, operating or in the management and control of ferries and ferryboats plying between Bayonne and Staten Island, New York, in the form hereto annexed; and with said notice said Deputy Clerk shall serve a copy of this resolution.

(4) That with said notice said Deputy Clerk serve the interrogatories also hereto annexed.

Dated, May 4, 1905.

JERSEY CITY, N. J., *May* 4, 1905.

GENTLEMEN: Notice is hereby given you that the Board of Chosen Freeholders of the County of Hudson will meet at the Court House in the City of Jersey City, on Tuesday, May sixteenth, instant, at three o'clock in the afternoon, for the purpose of investigating the rates of ferriage charged on ferries within the County of Hudson (excepting ferries in the cities of Hoboken and Jersey City), and, pursuant to law, to fix the rates to be taken at the several ferries within the County of Hudson (excepting ferries in the cities of Jersey City and Hoboken).

And notice is hereby given to you and each of you that at the time and place aforesaid you and each of you will be given a hear-
4 ing, if you desire the same, touching said matter in so far as you or each of you may be concerned in any of the ferries within the County of Hudson (excepting the cities of Jersey City and Hoboken).

And you and each of you are requested at said meeting to furnish the data and information contained in the interrogatories hereto annexed.

This notice is given pursuant to a resolution of said Board of Chosen Freeholders, a copy whereof is hereto annexed.

Yours respectfully, JOHN P. NOONAN,
Deputy Clerk.

To Weehawken Ferry Co., Weehawken Transportation Co., Hudson Connecting Railway Co., Open Cut and General Warehouse Co., Guttenburg Ferry Co., West Shore and Ontario Terminal Co., New York Central & Hudson River Railroad Co., West Shore Railroad Co., Richmond and Bergen Point Ferry Company, or whom it may concern.

Interrogatories.

(1) What ferry or ferries do you own, operate, lease, manage, or control plying between Hudson County (excluding Jersey City and Hoboken) and points outside of Hudson County?

(2) State the points between which each of such ferries ply?

(3) What number of ferryboats are used by you on each of said ferries?

(4) Is any such ferries used in connection with a railroad owned, controlled or operated by you; if so, state the name of the ferry or ferries and railroad or railroads.

5 (5) Any persons carried on such ferry or ferries who are not passengers on a rail or trolley road?

(6) State the value of the ferryboats, docks, terminal and other property used in connection with said ferries, and itemize the same.

(7) State the approximate number of foot passengers carried daily on each of said ferries.

(8) State approximately the number of persons who as passengers on a railroad are carried daily upon either of said ferries as part of the journey.

(9) State approximately the number of persons who as passengers on a trolley or street railway are carried daily upon either of said ferries and who by the purchase of a trolley or street railway ticket become entitled to cross either of said ferries without paying further compensation.

(10) State approximately the number of foot passengers carried daily over each of said ferries on journeys from Hudson County to points outside of Hudson County who pay ferriage directly to the ferry company either in cash or in ferry tickets purchased from the ferry company and who are not transported across said ferry by virtue of their being passengers on a railroad, trolley or street railway.

(11) State the gross receipts derived from the transportation of passengers and vehicles on each of said ferries.

(12) State the gross receipts derived from the passengers mentioned in the tenth interrogatory.

(13) State the gross receipts derived from the transportation of passengers mentioned in the eighth interrogatory.

(14) State the gross receipts derived from the transportation of passengers mentioned in the ninth interrogatory.

(15) State the gross expenses incurred and paid by you in the maintenance and operation of such ferry or ferries, and furnish items of such expense.

6 (16) State the rates of ferriage charged on each ferry for the transportation of persons who are passengers on railroads or trolley cars and by virtue thereof have the right of passage across such ferry.

(17) State the rates of ferriage per capita charged by you to any railroad or trolley company for the transportation of passengers on such rail or trolley road.

(18) State the present schedule of rates of ferriage charged by you for the transportation of passengers and vehicles across such ferry.

Adopted.

Meeting of May 16, 1905.

Mr. Albert C. Wall appeared for the New York Central and Hudson River Railroad Company, and denied the right of the Board to fix the rates of ferriage on the West Shore ferries. He had the interrogatories and read answers to some of them, but did not file the interrogatories with answers in so far as the same were answered. He was requested to file the interrogatories with the answers he had but it was suggested that he answer the other interrogatories in so far as he could and send the same to the Board before its next meeting.

Meeting of June 1, 1905.

NEW YORK, *May* 17, 1905.

To the Members of the Board of Chosen Freeholders of Hudson County, N. J.

GENTLEMEN: The fact of this communication being made to you is not to be deemed a recognition by the New York Central and Hudson River Railroad Company of any official right of your board to demand or have the information hereby communicated or to take any official action upon the subject matter of it.

This company distinctly denies the possession by your board of any such right, authority or power.

7 The company addresses this communication to you solely as and by way of a courtesy extended by it to you, not officially, but, as individual members of the general public of your County.

Its purpose is to afford to you respectively such information upon the subjects therein mentioned as in due course of courtesy to you this company deems it proper and reasonable to accord you, having just regard to the interests of the general public and to the interests of the company, in and in respect of the subjects to which the information has reference.

This company is the lessee of and as such possess and operates the railroad property and appurtenances of the West Shore Railroad Company extending from Buffalo, N. Y., via Albany, N. Y., and Weehawken, N. J., to the City of New York, N. Y., with various connecting lines.

As constituting a part of that railroad system this company owns and operates lines of boats between its railroad terminal at Weehawken, N. J., and Franklin Street, New York City, N. Y., three boats; between Weehawken, N. J., and Forty-second street, New York City, N. Y., two boats; and between West New York, N. J., and Forty-second street, New York City, N. Y., one boat.

West Shore R. R. ferries.

West Shore ferries.

Their primary service is the accom-odation of the patrons of the railroad proper in its general passenger, mail, express, baggage and freight service. These boats are accessible to and their service available to and are availed of in and for the transportation of persons and property other than travelers upon and shipments upon the railroad proper as distinguished from this navigation service.

The aggregate number of passengers carried daily on these boats is approximately 17,000 of whom approximately 12,000 are not passengers on the West Shore Railroad otherwise than upon these boats.

8 The company has no means of knowing who or how many of the said 12,000 patrons are passengers who come via. or from or are destined to or via trolley lines, nor how many of them are on journeys to or from points within, or how many to or from

points without the County of Hudson, nor how many of said 17,000 or said 12,000 travel by either of its said boat lines.

The schedule of fares and tolls exacted is the same on all three lines, a copy of it was deposited with the Clerk of your Board on May 16th inst.

The boats above mentioned in and about the said service rendered by them sail upon and over the public navigable waters of the United States and the service there rendered by them and in which they are engaged is solely that of commerce among the several states and between the United States and foreign countries.

The boats with their routes of navigation and the railroad of which they are a part, constitute as a- entirety a post route of the United States. The boats carry the property of the Federal Government together with other property and person over the public navigable waters of the United States and their service does not pertain to the domestic affairs of either state or to the people of either state as such, but to the affairs and people of the United States.

The only power possessing authority to prescribe and enforce uniform rules in respect of such navigation and commerce, and to supervise and regulate the fares and tolls to be exacted for that service, is the United States Government. It is the superior and the only one to whom the company operating these boats owes and must yield obedience in this behalf.

In so far as the right and power of the New York Central and Hudson River Railroad Company to provide and maintain this navi-
gation service rests upon authority of the State of New Jersey,
9 it was granted by the special charters of the constituent companies to which the West Shore Railroad Company succeeded, the charters of that company and its lessor companies and the railroad law of the State.

The charters and laws which confer the authority rights and powers above mentioned, prescribe in so far as it is within the power of the State to prescribe, the regulations of fares and charges for the authorized service and leave nothing in that regard subject unto the supervision or control of county or municipal authorities.

These are expressions of legislative will and intent of later date than the Act of 1798, and by them the Legislature has itself exercised the power of supervision and regulation concerning the subjects mentioned. Sections 19, 38, and 43 of the Railroad Law, Chapter 257 of the Laws of 1903, cover the entire subject, and thus supersede the provisions of the Act of 1799, if indeed, without these later enactments that Act could have been deemed applicable to this service.

Yours respectfully,

ALBERT H. HARRIS,
General Attorney.

Received anr referred to Committee of the Whole and counsel of the board.

Resolutions Passed July 6, 1905.

By Freeholder DEMPSEY:

Whereas, this Board at a meeting held on May fourth last, pursuant to an act of the legislature of the State of New Jersey, entitled "An Act concerning ferries," passed February 6, 1799, passed a resolution to inquire into the rates of ferriage charged at the several ferries within the county of Hudson outside of the cities of Jersey City and Hoboken, and fixed Tuesday, May 16, 1905, at three o'clock in the afternoon, at the Court House in the city of Jersey City, as the time and place when and where it would give a
10 hearing to the owners, proprietors, lessees, persons, firms or corporations in the operation, management and control of such ferries operating within the county of Hudson, outside of the cities of Jersey City and Hoboken, and directing upon whom notice should be served, and with which notice certain interrogatories were to be served, all of which appears by said resolution, notice and interrogatories heretofore passed and approved by this Board, which said resolution, notice and interrogatories are made a part hereof; and it appearing that due notice of said hearing was given; and

Whereas, at the time and place so fixed this Board met, and there appeared before it, in response to said notice, Albert C. Wall, Esq., of the law firm of Vredenburgh, Wall & Van Winkle, representing the New York Central & Hudson River Railroad Company, the lessee in possession of and operating lines of ferry between the railroad terminal of the West Shore Railroad Company at Weehawken, N. J., and Franklin Street, in the city of New York, and between Weehawken, N. J., and Forty-second Street, New York City, and between West New York and Forty-second Street, New York City, all known as the West Shore Ferries; and also received a communication from Frank Bergen, Esq., general counsel of the Port Richmond and Bergen Point Ferry Company, which company is engaged in the operation of a ferry from Bergen Point, in the county of Hudson, to Staten Island, New York; and after said meeting said New York Central & Hudson River Railroad Company communicated with this Board, through Albert H. Harris, Esq., its general attorney, by letter dated May 17, 1905; and

Whereas, this Board having taken time to consider what had been urged and presented to it on the subject of the rates of ferriage to be imposed and charged on the ferries, and duly considered the same, and it appearing to this Board that the rates to be taken at the
11 several ferries specifically above mentioned, within the county of Hudson, for the transportation and carriage of foot passengers from the county of Hudson to the terminal of said ferries in the state of New York and return should be six cents for the round trip for each person; therefore, be it

Resolved, that in the exercise of its discretion, and pursuant to the direction of said last mentioned act, this Board does hereby fix the rates of ferriage to be charged by the aforesaid companies for the transportation of foot passengers from the county of Hudson to the

terminal of said ferries in the State of New York and from said terminal returning to the county of Hudson, at the rate of six cents for each adult person, for the round trip, and four cents for each person under ten years of age; and be it further

Resolved, that true copies of this resolution, certified by the Clerk of this Board under the seal of the County, be forwarded to the New York Central & Hudson River Railroad Company and the Port Richmond & Bergen Point Ferry Company.

Dated July 6, 1905.

Adopted by the following vote:

Yeas:—Freeholder- Bernhardt, Crosby, Dempsey, Diehl, Dite, Doody, Ehrhart, Fallahee, Griffin, Henzi, Hogan, McCarty, McDonald, McManus, Nurge, O'Hare, Pairson, Roche, Schmidt, Smith, Schwartz and Director Clark—22.

Nays.—None.

Absent.—Freeholders Clements, Condon, Langan and Rath—4.

Freeholder McDonald moved that a committee of five be appointed to wait on the Ferry Companies in reference to the foregoing resolution and to take steps to enforce the same.

Adopted.

The Director thereupon appointed as such committee Freeholders Dempsey, McCarty, Nurge, McDonald and O'Hare.—5.

12 By Freeholder DEMPSEY:

Whereas, this Board at a meeting held on May fourth last, pursuant to an act of the legislature of the State of New Jersey, entitled "An Act concerning ferries," passed February 6, 1799, passed a resolution to inquire into the rates of ferriage charged at the several ferries within the county of Hudson, outside of the cities of Jersey City and Hoboken, and fixed Tuesday, May 16, 1905, at three o'clock in the afternoon, at the Court House in the city of Jersey City, as the time and place when and where it would give a hearing to the owners, proprietors, lessees, persons, firms or corporations in the operation, management and control of such ferries operating within the county of Hudson, outside of the cities of Jersey City and Hoboken, and directing upon whom notice should be served, and with which notice certain interrogatories were to be served, *and with which notice certain interrogatories were to be served*, all of which appears by said resolution, notice and interrogatories heretofore passed and approved by this Board, which said resolution, notice and interrogatories are made a part hereof; and it appearing that due notice of said hearing was given; and

Whereas, at the time and place so fixed this Board met, and there appeared before it, in response to said notice, Albert C. Wall, Esq., of the law firm of Vredenburgh, Wall & Van Winkle, representing the New York Central & Hudson River Railroad Company, the lessee in possession of and operating lines of ferry between the railroad terminal of the West Shore Railroad Company, at Weehawken, N. J., and Franklin Street, in the city of New York, and between Weehawken, N. J., and Forty-second Street, New York City, and between

West New York and Forty-second Street, New York City, all known as the West Shore Ferries; and also received a communication from Frank Bergen, Esq., general counsel of the Port Richmond
13 & Bergen Point Ferry Company, which Company is engaged in the operation of a ferry from Bergen Point, in the county of Hudson, to Staten Island, New York; and after said meeting said New York Central & Hudson River Railroad Company communicated with this Board, through Albert H. Harris, Esq., its general attorney, by letter dated May 17, 1905; and

Whereas, this Board having taken time to consider what had been urged and presented to it on the subject of the rates of ferriage to be imposed and charged on the ferries aforesaid, and duly considered the same, and it appearing to this Board that the rates to be taken at the several ferries specifically above mentioned, within the county of Hudson, for the transportation and carriage of foot passengers from the county of Hudson to the terminal of said ferries in the State of New York, should be three cents for each person; therefore, be it

Resolved, that in the exercise of its discretion, and pursuant to the direction of said last mentioned act, this Board does hereby fix the rates of ferriage to be charged by the aforesaid companies, for the transportation of foot passengers from the county of Hudson by said ferries to the terminal of said ferries in the State of New York, at the rate of three cents for each adult person, and two cents for each person under ten years of age; and be it further

Resolved, that true copies of this resolution, certified by the Clerk of this Board under the seal of the County, be forwarded to the New York Central & Hudson River Railroad Company and the Port Richmond & Bergen Point Ferry Company.

Dated July 6, 1905.

14 Adopted by the following vote:

Yeas:—Freeholder Bernhardt, Crosby, Dempsey, Diehl, Dite, Doody, Ehrhart, Fallahee, Griffin, Henzi, Hogan, McCarty, McDonald, McManus, Nurge, O'Hare, Pairson, Roche, Schmidt, Smith, Schwartz and Director Clark.—22.

Nays.—None.

Absent:—Freeholders Clements, Condon, Langan and Rath.—4.

15 New Jersey Supreme Court.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Prosecutor,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant.

Reasons.

And the said prosecutor, by Vredenburgh, Wall & Van Winkle, its attorneys, comes and assigns the following reasons why the said

resolutions and proceedings brought up by the writ in this cause should be set aside, annulled and for nothing holden:—

First. Because the resolutions were not adopted in the manner required by the statute.

Second. Because the resolutions are unreasonable, unjust and illegal.

Third. Because the service performed by the prosecutor, and for which the said resolutions prescribe and limit the rates of fare, is not a ferry service within the meaning of the statute under the supposed authority of which the said resolutions were adopted, for that the said boats are maintained and operated by the prosecutor, and perform their transportation service, as and by way of a projection or prolongation of its railroad transportation service, the primary purpose thereof being such transportation to and from its railroad terminal at Weehawken of passengers coming to said boats immediately from or going from said boats immediately to its railroad trains thereat.

16 Fourth. The so-called ferry the service of which said resolutions purport to regulate the rates of fare for, is not a ferry within the meaning of the statutes relied upon by the said Board for the power of such regulations, for that the said ferry has not its landing place upon a general public highway and is not a continuation of a general public highway, but the landing thereof is upon the private property of and constituting the railroad terminus of the prosecutor, and the primary ferry service thereby rendered constitutes a prolongation or extension of the railroad transportation service performed by the prosecutor.

Fifth. The prosecutor is a railroad corporation, and as such is the lessee of, and as such lessee operating the West Shore Railroad, having its easterly terminus on the shore of the Hudson River at Weehawken in the County of Hudson, and as such has established and is operating ferries for the transportation of persons and property on and across the said river from said railroad terminus at Weehawken to points in the City and State of New York and vice versa, and it is the said ferry service thus by prosecutor performed and rendered from said Weehawken to New York for and upon which the resolutions herein complained of purport to regulate the rates of fare. In so far as any law of this State either prescribes or provides regulation of the rates of fare for such transportation such regulation is embodied in Sections Nineteen, Thirty-eight and Forty-three of Chapter 257 of the Laws of 1903, entitled, "An act concerning railroads," approved April 14, 1903, among other things, to wit:—

"Such company may establish and operate ferries for the transportation of persons and property on or across the same, subject to the rates of fare and tolls provided in this act on railroads, and may buy or build vessels and boats and do all things necessary or convenient to carry on such ferry."

17 "Any railroad company may demand and receive such sums of money for the transportation of persons on its railroad and connections, and for any other services connected with the

business of transportation of persons on or over said railroad or to or from the same as it shall from time to time think reasonable and proper, not exceeding in the case of railroad companies organized under this act, three cents per mile for carrying each passenger on such railroad, and not exceeding in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter, but no charge shall be required to be less than ten cents."

By reason of all whereof the regulations embodied in the said resolutions are and each thereof is unauthorized, illegal and wholly void.

Sixth. Because the defendants were not authorized by law to adopt the resolutions in question, for that the power conferred upon the said Freeholders to prescribe the rates of fare for ferry service does not embrace that to prescribe rates of fare for transportation upon ferries operated by railroad corporations in conjunction with their railroad transportation service.

Seventh. Because the resolutions unreasonably interfere with the prosecutor in the exercise of its chartered rights and privileges, and are illegal in that the rate of fare therein designated is substantially inadequate to fairly compensate the prosecutor for and in respect of the capital employed and the service involved by it, and hence the said resolutions impair the obligations of the contract arising upon the grant, acceptance and exercise of the said charter
18 powers, and deprive the prosecutor of its property without compensation and without due process of law, and therein violates Article One, Section Ten and the Fourteenth Amendment of the Constitution of the United States.

Eighth. That subject only to exceptional instances in which the State of New Jersey has in and by its charter of corporations or otherwise conferred specified bridges or ferry rights to the measurable exclusion of competitors, any person having the requisite riparian property rights, so far as her laws are concerned, is free to establish and operate such ferries therefrom as he may choose, without procurement of license or payment of license fee, and to exact for such ferry or bridge service such reasonable compensation as may be fixed by contract, express or implied, between such ferryman and his patrons, save and except only as the amount of such exaction may, under the authority and in the manner provided by statute in such behalf, be limited by the reasonable regulation thereof adopted and promulgated by the Board of Chosen Freeholders of the county in which such ferry is situate. That the right and power of such regulation does not embrace that of limiting rates of fare for continuous ferry transportation of persons from points in this state to points in another state, and such attempted regulation is violative of the commerce clause of Section Eight of Article One of the Constitution of the United States.

Ninth. Because there are many other ferries in the County of Hudson, similarly situated to the ferries of this prosecutor, which ferries are not affected by, and were not intended by the Board of

Chosen Freeholders to be affected by said resolutions or by any resolutions of said Board. This prosecutor insists that the Board has no right to select out of the many ferries in the county of Hudson similarly situated, the ferries owned by this prosecutor, and fix the rates of ferriage to be charged by it alone, leaving the
19 rates to be charged by other ferries similarly situated uncontrolled and unrestrained by any resolution of said Board. That the prosecutor being a person within the jurisdiction of the State of New Jersey, the said regulation in the particulars above mentioned denies to it the equal protection of the laws and therein contravenes the Fourteenth Amendment of the Constitution of the United States.

Tenth. Because the said resolutions are in violation of the Constitution of the United States and of the Statute of the United States entitled "An Act to regulate commerce" (which statute was approved on the fourth day of February, eighteen hundred and eighty-seven), and the supplements thereto.

Eleventh. Because the resolutions are an interference with and regulation of interstate commerce, and therein are violative of the commerce clause of Section Eight of Article One of the Constitution of the United States.

Twelfth. The prosecutor insists that the only power possessing authority to prescribe and enforce uniform rules in respect of such navigation and commerce, and to supervise and regulate the fares and tolls to be exacted for that service, is the United States Government, and hence that the said regulation is illegal and void for that it contravenes the commerce clause of Section 8 of Article 1 of the Constitution of the United States.

Thirteenth. Because the ferry boats used for the said ferry sail upon and over the public navigable waters of the United States, and the service rendered by them and in which they are engaged, is solely that of commerce between the several states; that the said boats, with their routes of navigation and the railroad of which they are a part, constitute as an entirety a post route of the United States; that the boats carry the property of the Federal government, together with other property and persons, over the public
20 navigable waters of the United States, and their service does not pertain to the domestic affairs of either State or to the people of either State, as such but to the affairs and people of the United States. The boats are enrolled and licensed for the coasting trade under United States statutes and navigate the waters of the Hudson River under authority of such enrollment and license. By reason of all whereof the said regulations transcend the power of the jurisdiction of the State in that they prescribe regulation of interstate commerce, and deprive the prosecutor of its property without due process of law and therein offend against Article 1, Section 8 and the Fourteenth Amendment of the Constitution of the United States.

Fourteenth. The rule administered by the courts is, upon principle, reciprocal, to wit: that the Federal Government does not by its charter of a corporation with power to carry on both interstate

and intrastate commerce place within its jurisdiction the power of regulation of the rates of fares chargeable by such corporation for its service in intrastate transportation or transmission; and the State government, by its charter of a corporation with the same powers, does not place within its jurisdiction the power of regulation of the rates of fares chargeable by such corporation for its service in interstate transportation or transmission.

Fifteenth. Because, for other reasons, the resolutions are illegal and void.

VREDENBURGH, WALL & VAN WINKLE,
Attorneys of Prosecutor.

21 New Jersey Supreme Court.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Prosecutor,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,
Defendant.

On Certiorari.

Testimony taken in the above entitled cause before me, Pierre F. Cook, a Supreme Court Commissioner, this seventeenth day of October, nineteen hundred and six, at two o'clock in the afternoon, at the office of Vredenburgh & Wall, No. 1 Exchange Place, Jersey City, New Jersey, pursuant to notice.

Appearances:

Messrs. Vredenburgh & Wall, Attorneys of Prosecutor.
John Griffin, Esq., Attorney of Defendant.

——— ———,
Supreme Court Commissioner.

It is stipulated that the signatures of witnesses be waived.

BENJAMIN C. FESSENDEN, a witness called on behalf of the prosecutor, being duly sworn on his oath, according to law, testifies as follows:

Direct examination by Mr. WALL:

Q. Mr. Fessenden, in what capacity are you connected with the prosecutor in this cause?
A. Superintendent of ferries.
Q. And about how long have you been such superintendent?
22 A. About twenty-three years, with the exception of six months.

Q. Does the West Shore Ferry at Weehawken come under your supervision?

A. Yes, sir.

Q. By whom is that ferry operated?

A. By the New York Central and Hudson River Railroad.

Q. Does any other railroad company make use of it?

A. The New York, Ontario and Western Railroad.

Q. And do the passengers of the New York, Ontario and Western Railroad go over it?

A. Yes, sir.

Q. Is the New York Central the owner or the lessee of the ferry?

A. The lessee.

Q. And who is lessor—who is the owner?

A. The West Shore Railroad.

Q. Where are the ferries operated from the terminus of the West Shore at Weehawken—to what points?

A. To Franklin street, New York, and to West 42nd street, New York.

Mr. GRIFFIN: I object to this evidence on the ground that the information was furnished to the Board of Chosen Freeholders of the County of Hudson by the Prosecutor in a letter dated May 17th, 1905, intended as an answer to interrogatories submitted, and which letter and interrogatories appear as part of the return to the writ in this case.

By Mr. WALL: The letter you refer to is the letter in which it is stated that communication is made to the members of the Board of Freeholders as persons and not in their individual capacity.

23 Q. Captain, how many ferry boats are in use between Weehawken and Franklin street?

By Mr. GRIFFIN: I object to this question on the ground that the information was furnished to the Board of Chosen Freeholders of the County of Hudson by the Prosecutor in a letter dated May 17th, 1905, intended as an answer to interrogatories submitted, and which letter and interrogatories appear as part of the return to the writ in this case.

A. Three.

Q. Between Weehawken and West 42nd street?

By Mr. GRIFFIN: I object to the question on the ground that the information was furnished to the Board of Chosen Freeholders of the County of Hudson by the Prosecutor in a letter dated May 17th, 1905, intended as an answer to interrogatories submitted, and which letter and interrogatories appear as part of the return to the writ in this case.

A. Two.

Q. Between West New York and 42nd street?

By Mr. GRIFFIN: I object to the question on the ground that the information was furnished to the Board of Chosen Freeholders of the County of Hudson by the Prosecutor in a letter dated May 17th,

1905, intended as an answer to interrogatories submitted, and which letter and interrogatories appear as part of the return to the writ in this case.

A. One.

Q. Do you know anything with reference to the manner in which the schedules of the trips of the ferry boats in question are arranged?

By Mr. GRIFFIN: Objected to for the reason that no such information was furnished to the Board of Chosen Freeholders of
24 the County of Hudson in answer to interrogatories, or otherwise, so that the Board did not have any such information at all to act upon in the passage of the resolution sought to be reviewed.

A. Yes, sir; the ferry schedules are made up with direct reference to the trains east and west bound, on the same dates and to correspond with the leaving time and the arriving time of the trains.

Q. What is the value of the ferry boats?

By Mr. GRIFFIN: Objected to because that information was called for in the interrogatories presented to the Prosecutor and was answered in the letter of May 17th, 1905, above referred to, all of which appears by the return to the writ, and the prosecutor is not entitled now to offer other or different evidence on the subject.

A. Four sidewheel boats valued in 1904 and 1905 at $35,000 each, five sidewheel boats worth about $65,000, and the two double deck propeller ferry boats worth about $150,000 each.

Q. Captain, I show you certain papers entitled "Certificate of Enrollment," and ask you what they are?

A. These are the certificates of enrollment of the following boats: Buffalo, Albany, West Point, Syracuse, Oswego, Newburgh and Kingston.

Certificate of Enrollment offered in evidence and marked Exhibit P. 1.

Q. I show you papers entitled "License- of Vessels," and ask you if they are licenses issued by the United States for the same vessels named in these certificates of enrollment?

A. Yes, sir.

Licenses offered in evidence and marked Exhibit P. 2.

Q. Were those boats all engaged in work at the ferries in the years 1904 and 1905?

A. Yes, sir.

25 Q. Captain, I show you a letter from the Department of Commerce and Labor, and ask you what it is?

A. Copy of the dates of issue and the dates of expiration of Pilots' and Engineers' licenses.

By Mr. GRIFFIN: I will admit that the pilots and engineers operating the boats used in the ferry business already testified to all performed their separate duties under licenses issued by the United States Government.

Q. Do you know, Captain, to whom the land occupied by the various ferries at Weehawken belongs?

By Mr. GRIFFIN: Objected to because that information was called for in the interrogatories presented to the prosecutor and was answered in the letter of May 17th, 1905, above referred to, all of which appears by the return of the writ, and the prosecutor is not entitled now to offer other or different evidence on the subject, and also for the reason that the deed itself would be the best evidence.

A. It is leased to the New York Central and Hudson River Railroad Company, and owned by the West Shore and Ontario Terminal Company.

Cross-examination by Mr. GRIFFIN:

Q. How do you know that these four sidewheelers are worth about $35,000 each.

A. I know that they were inventoried at that price during these years 1904 and 1905.

Q. What is your particular business?

A. I have been Superintendent of the ferries there for ten years, but I am a sea captain by profession.

Q. Have you ever attended to the construction of vessels?

A. Yes, sir.

Q. And have you made an examination of these various vessels, their engines and boilers, for the purpose of ascertaining their market value?

26 A. I am familiar with them from being constantly on them every day.

Q. I mean have you made an examination of them for the purpose of appraising them?

A. No, sir, I have not.

Q. Who made the appraisement of these vessels for the purpose of your inventory?

A. I can't tell you who did that.

Q. Then your figures here are given, not on your own appraisal, but as taken from the inventory of the company?

A. Yes, sir

Q. And that applies to all the vessels the value of which you have testified to?

A. Yes, sir. The two propeller boats are virtually new, and the other boats are twenty five years old and naturally their value has depreciated from their original cost.

Q. Now how do you know that the land is leased by the Ontario and West Shore Terminal Company to the New York Central and Hudson River Railroad?

A. Simply being there and hearing that a lease was made and the grounds and so forth were transferred to the New York Central.

By Mr. GRIFFIN: I now object to the testimony of this witness as to the value of the vessels and the fact that a lease was made of this land to the New York Central, on the ground that it is purely hearsay and not within the witness' own personal knowledge.

CLARENCE A. FISHER, a witness called on behalf of the prosecutor, being duly sworn on his oath, according to law, testifies as follows:

Direct examination by Mr. WALL:

Q. Mr. Fisher, where — you employed?
A. I am employed by the General Land and Tax Department of the New York Central and Hudson River Railroad.
27 Q. What is your employment—your profession?
A. Draughtsman and civil engineer.
Q. Are you familiar with the land used for ferry purposes at Weehawken?
A. Yes, sir.
Q. What is this blue print you have here? (Referring to blue print map produced by witness.)
A. It is a blue print of the Weehawken yard.
Q. Are you able to identify on that the land used for ferry purposes?
A. Yes, sir.
Q. Is that map correct?
A. To the best of my knowledge and belief it is.
Q. So far as regards the ferry property I am asking you?
A. Yes, sir.
Q. Have you made any attempt to check up this map with the ground—with the location of the ground?
A. Yes, sir. I am confining myself to the ferry.
Q. And you swear that that is correct, do you?
A. Yes, sir.
Q. What is the area of the land used for ferry purposes?
A. It is one and ninety-six one-hundredths acres for ferry purposes.
Q. And the area you refer to is comprised within what boundaries indicated on the map?
A. It covers the passageway, also the porters' stores and waiting rooms.
Q. The area you refer to is bounded on the east by what?
A. The Hudson River.
Q. On the south by what?
A. South by the bulkhead line I should say.
Q. On the west by what?
A. On the west by the passenger station and by a portion of the driveway leading to Clifton Road.
Q. And on the north by what?
28 A. By the portion of the map marked Express Company.

By Mr. WALL: I offer in evidence the portion of the map which shows the area testified to by the witness.
By Mr. GRIFFIN: I object to it on the ground that it does not appear that the witness made the map.
Map marked Exhibit P. 3.

Cross-examination by Mr. GRIFFIN:

Q. Who made this map, Exhibit P. 3, do you know?
A. I don't know who traced it; it is a matter of tracing.
Q. Where did you get the map from?
A. I got it from the files where it is kept on record.
Q. What did you do towards verifying the figures that you have testified to?
A. I have not testified to any figures.
Q. Well, you have testified to checking up the map?
A. Well, I could check it up with my eye, as far as that is concerned.
Q. But you didn't check it up on the land?
A. Yes, sir; I checked it up on the land.
Q. Just tell us how you did it.
A. Well, what I saw with the eye.
Q. You didn't use any measurements—make any measurements?
A. No, sir.
Q. Just looked over the area and concluded it was accurate?
A. No, as far as the area is concerned, I know that the map is drawn to a scale of one hundred feet to an inch.
Q. Then you calculated on the map produced what the area was within the lines you have testified to as being the ferry property?
A. Yes, sir.
29 Q. But as to whether or not the distances shown on that map are accurate, you don't know?
A. Well, there is no distance shown on the map.
Q. Well, how can you get the area if there is no distance shown on the map?
A. Well, there is no figures of distances to show what it is by the scale of one hundred feet to the inch, but by the scale we can produce figures to work from.
Q. Can you tell whether or not that map is true to the scale of one hundred feet to the inch?
A. Why, yes, I can.
Q. How?
A. By taking measurements on the ground.
Q. But you have not done so?
A. No, I have not.
Q. In testifying to this area you assume that this map is accurately made to the scale of one hundred feet to the inch?
A. Yes, sir.
Q. You took your rule and measured up the distance and then calculated the area?
A. Yes, sir.

Redirect by Mr. WALL:

Q. Didn't you go to the place in the ferry slips that you have testified to the area of?
A. Certainly I have been there.
Q. Did you go for the purpose of testifying here?
A. No, sir; I didn't.

Q. Have you ever done any work around the ferry slips which would give you any idea as to the accuracy of that map?
A. Yes, sir.
Q. What?
A. In 1899 I helped make a survey of the Weehawken yard.
Q. Did that survey comprise the ferry area?
A. Why yes, what is included in this ferry property.
30 Q. Did the survey which you made in 1899 cover the same ground that your testimony as to area has covered?
A. Yes, sir.
Q. And in making that survey did you use that map?
A. We did not.
Q. Was that map made from that survey?
A. Yes, sir; retraced from it.
Q. So can you say from that survey that you made, or helped make in '99, that that map correctly sets forth the areas of the ferry property to which you have testified?
A. Yes, sir; I can.

Recross by Mr. GRIFFIN:

Q. You say that you made a survey in 1899 and that from that survey the map was made?
A. Yes, sir.
Q. Who made the map?
A. I done the plotting on it myself.
Q. But on the final map as finished, who did the work?
A. I made the finished map.
Q. Is this the finished map?
A. No, sir.
Q. Is it a blue print of the finished map?
A. Yes, sir; as far as the ferry is concerned.
Q. Is this map which has been offered in evidence as Exhibit P. 3 the map that was made from your survey?
A. I am testifying as to the ferry property.
Q. But I am asking you now whether your survey of '99 was reproduced in a map of which this one now produced is a copy?
A. Why no, it is not.
Q. Now then what did the survey you made in '99 cover?
A. It covered the limits of that map.
31 Q. The limits of the copy P. 3?
A. Of the Weehawken yard taken from north to south.
Q. How much more is in this map then which you say was covered by your survey?
A. All Weehawken is shown on that map.
Q. By what means was the result of your survey transferred to this map?
A. It is a matter of tracing.
Q. Who did the work?
A. I can't say who made the map.
Q. You don't know whether the draughtsman who transferred

from your map to this one carried the tracing accurately or not, do you?

A. That is putting an assumption of faulty work on the part of the New York Central's engineers.

Q. But you can't say that is accurate of your own knowledge, that it was accurately translated from the map which you made?

A. Why, yes; I will say that is properly shown.

Q. My question is can you say from our own knowledge that the draughtsman who used your map of '99 in making up this map, accurately translated from your survey map this ferry property to this map?

A. As far as the ferry is concerned.

Q. How do you know?

A. As I say I have been through that ferry hundreds of times.

Q. Can you tell without looking at the map how many feet it is from the north of the ferry property to the south—from the north line to the south line?

A. It is 250 or 260 feet.

Q. Which is it?

A. 260 feet.

Q. Why did you say 250 feet at first; is it not to some extent a guess?

A. Certainly it is.

32 Q. Can you tell what the distance is from the east to the west? In giving your testimony you mention the Hudson River as the easterly line; what did you mean high or low water mark?

A. Well, I used the bulkhead line.

Q. Did you use the bulkhead line in this calculation of area?

A. Yes, sir, for ferry property.

Q. And by calculating by that method you get this total of 1 96-100 acres?

A. Yes, sir.

Q. Now what is the distance between the bulkhead line and the waiting room of the New York Central?

A. It depends upon what part you take, whether you take the north wall line or the south line.

Q. Well, take the north line.

A. 240 feet.

Q. Are you sure of that?

A. No, I am not sure of it.

Q. It is about that?

A. Yes, sir; about 240 feet.

Q. That is a species of guess, too, isn't it?

A. Yes, sir.

Q. What is it on the south line?

A. I should say 250 feet on the south line.

Q. That is also a guess?

A. Yes, sir.

CORNELIUS CHRISTIE, a witness produced on behalf of the prosecutor, being duly sworn according to law, testified as follows:

Direct examination by Mr. WALL:

Q. Mr. Christie, you were formerly connected with the New York Central?

A. Yes, sir; I am at the present time.

Q. And were you in charge of the division terminating at Weehawken?

A. Yes, sir.

Q. What was your title?

33 A. Division superintendent.

Q. And you were such division superintendent until when?

A. October 1st, 1906.

Q. And from when?

A. August 21st, 1902.

Mr. GRIFFIN: What division is that?

WITNESS: The River Division.

Q. Which comprise what?

A. Comprises the West Shore Railroad property from Weehawken to Albany, the Walkill Valley Railroad between Kingston and Montgomery and the New Jersey Junction Railroad between Weehawken and Pennsylvania Junction, and the ferry property at Weehawken and West New York.

Q. Do you know what company operates the ferry at Weehawken?

A. The New York Central and Hudson River Railroad.

Q. Do you know anything as to the value of its ferry boats?

A. I do not, except from hearsay—not from personal knowledge.

Q. Do you know anything as to the operation of the ferries in connection with the trains?

A. Yes, sir.

Q. What is the method of operating the boats so far as the trains are concerned?

A. The method is for passengers arriving at Weehawken on eastbound trains to take the ferry boats to Franklin street and West 42nd street, as the case may be. The westbound passengers desiring to take the trains will take the boats at West 42nd street or Franklin street, as the case may be, and then take the trains at Weehawken to points west.

Q. What determines the arrival and departure of the ferry boats?

34 A. It depends entirely upon the arriving time and the leaving time of the trains. In other words the boats run to serve the convenience of the trains.

Cross-examination by Mr. GRIFFIN:

Q. Do you mean to say that there are no trains run at times when no trains are due to arrive?

A. No, I don't mean to say that, because there are frequent intervals when that is so.

Q. As a matter of fact is there not a schedule upon which the boats run?
A. Yes, sir.
Q. And that schedule is made up and is used regardless of whether trains arrive or leave at any particular time?
A. Not altogether.
Q. Well, you have boats that are called train boats, have you not?
A. Yes, sir.
Q. And you have other boats that are run that are not called train boats?
A. Yes, sir.
Q. Then the ferry boats are also run for the convenience of citizens of that section who are not passengers on your trains, as well, are they not?
A. Yes, that is true.

EDWARD S. VAN DEUSEN, a witness produced on behalf of the prosecutor, being duly sworn according to law, testified as follows:

Direct examination by Mr. WALL:

Q. Mr. Van Deusen, in what capacity are you connected with the prosecutor?
A. As land and tax agent.
Q. And have been such for how long?
A. I have been land and tax agent for a period of about two years past, and have been connected with the company in a similar capacity for twenty years past.
35 Q. Do you know the properties which are used for ferry purposes at Weehawken and West New York and which are operated by the New York Central?
A. I do.
Q. Of what do such properties consist?
A. At Weehawken of the ferry racks and platforms and the concourse——
Q. What is the concourse?
A. The area lying between the shore end of the platforms and the main station of the West Shore Railroad. A small ferry waiting room, which is south of the main passenger station, and the passageway running from this concourse out to the Clifton Drive which extends down to the ferry. This is all at the lower ferry. At the upper ferry is the ferry rack, the platform and station buildings.
Q. What is the other name for the upper ferry?
A. It is the West New York Ferry, and called the Old Ferry, too, I think.
Q. Are you familiar by virtue of your service in the Land and Tax Department, or otherwise, with the values of the property concerning which you have just spoken?
A. I am.
Q. What are these values?

By Mr. GRIFFIN: I object to the question on the ground that this information was asked in the interrogatories submitted by the Free-

holders to the prosecutor for the purpose of determining what the proper charge should be for ferriage, and the prosecutor declined to furnish the information, and therefore it is inadmissible in this proceeding.

A. A property known as the Weehawken Ferry the valuation upon the buildings and structures would be approximately $105,000.

Q. And the upper ferry?

A. At the West New York or upper ferry, about $30,000—that is for the buildings and structures.

36 Q. Exclusive of the land?

A. Yes, sir.

Q. And the land, what is that worth at Weehawken?

A. There are portions of the land which are filled in which would be considered worth—(interrupted)——

Q. I mean the land used for ferry purposes?

A. Some portions of it are filled and other portions are not. Probably eight or nine thousand dollars per acre would be a fair valuation upon it.

Q. In what manner do you make up the valuations of the structures and so forth to which you have just testified?

A. These valuations are based upon the cost of reproduction of the structures, in 1904 or 1905, and from which certain deductions are made for depreciation, owing to their present condition.

Q. What is the value of the land at West New York Ferry?

A. The value of the land at the West New York Ferry would probably be three-fourths of the value of that at Weehawken. It is considered a little less valuable.

Cross-examination.

By Mr. GRIFFIN:

Q. Did you appraise the buildings and structures at Weehawken Ferry, at the main passenger station, at $105,000?

A. I didn't personally appraise the ferry structures—I mean the racks and platforms and so forth, but these are the result of appraisements made by our Engineer of Bridges and based upon that.

Q. But can you tell of your own knowledge what it would cost to reproduce the buildings and structures at the Weehawken ferry?

A. I don't think I should presume to do so.

Q. Then your whole information as to the value of these buildings and structures is based upon data in the possession of the company, and not from your own knowledge—is that right?

37 A. It is based upon that, except of my own knowledge of the nature of the buildings and structures.

Q. Tell us wherein your own knowledge bore any part in making the calculation?

A. As to the buildings and structures?

Q. Yes.

A. Why I know in a general way the nature of the waiting room building and of the structure covering this concourse, but I never

myself made an estimate of the cost of the construction of the bridges or racks.

Q. Well do you know enough of the business generally, without any outside assistance, to make that kind of a calculation, if you should undertake it?

A. I think I could make a calculation of that kind, if I undertook it, yes.

Q. But you have not undertaken it?

A. No, I have not undertaken it.

Q. Then your statement as to this valuation of $105,000 is a guess, is it?

A. No, sir, that is my judgment based upon information that I have received from what I consider a reliable source and from men who are perfectly competent to judge.

Q. Then you are testifying to this valuation based upon information you have received from others?

A. To some extent.

Q. Can you now say of your own knowledge what the buildings and structures at the Weehawken ferry are worth, or what they cost, or what they would cost to replace?

A. I don't think I could state positively what it would cost to replace these buildings and structures. No one could do that unless they made actual measurements and estimates of the cost.

A. And that you have not done?

A. No, sir, that I have not done.

Q. Have you undertaken to examine the amount of depreciation of the buildings and structures for the purpose of testifying here as to their present value?

38 A. Not specially at this time. I know the length of time that the buildings have been in existence, and, in a general way at least, the condition of repair in which they have been kept.

Q. Your testimony as to the value of the West New York Ferry buildings and structures is substantially the same as to the Weehawken Ferry?

A. It is based upon similar information from the same source.

Q. And not entirely from your own knowledge?

A. No, sir, not entirely of my own knowledge.

By Mr. GRIFFIN: I now move to strike out all the testimony of this witness as being hearsay and not founded upon his own knowledge.

Redirect examination.

By Mr. WALL:

Q. Does your connection with the Land and Tax Office in any way call your attention to the values of these ferry structures?

A. It does.

Q. In what way?

A. In connection with the valuation of the structures for assessment purposes, and estimates of the value of these or like structures which we are called upon to make for the company.

Q. Then am I correct in saying that the valuation of these ferry slips have passed under your examination for the last twenty odd years annually?

A. Well, yes, for the last twenty years they have.

Q. And that you have yourself examined the returns made by the Railroad Company to the State Board of Assessors for taxation?

A. Yes, sir, I have.

Q. And the assessments levied by the State Board were on the basis of these returns?

A. Yes.

Q. And the original estimates during that period would form a basis for making the return?

39 A. Yes, they have all come to my notice and been the subject of inquiry and investigation by me for this purpose.

Q. And have you, in order to make these returns, compared those assessments of the ferry property with other ferry properties along the Hudson River?

A. Yes, sir, I have.

Q. Other assessments of the State Board on other property?

A. No, not as to ferry properties, but as to other railroad property I have made such comparisons and examination.

Q. Have you copies of the assessments?

A. Yes, I have copies of the assessments.

Q. Made by the State Board of Assessors upon the property you have testified to?

A. Yes, sir.

Q. Have you them with you?

A. I have printed copies furnished by the State Board.

Q. Are you able to identify on the report of the State Board of Assessors the ferry property to which you have testified

By Mr. GRIFFIN: Objected to on the ground that the report to the State Board of Assessors by the prosecutor is not evidence of value, neither is the ascertainment of the value by the State Board of Assessors evidence of value.

A. I am.

Q. Indicate on the printed report of the State Board of Assessors for the year 1905 the ferry property to which your testimony has reference, giving the assessment of the property as found by the State Board.

By Mr. GRIFFIN: Objected to on the ground that the report to the State Board of Assessors by the Prosecutor is not evidence of value, neither is the ascertainment of the value by the State Board of Assessors evidence of value.

40 A. I read from page 703 of the report of the State Board of Assessors for 1905, at page 703 the land assessment appears as the first item of assessment of second class railroad property in the Taxing District of Weehawken Township, 14 715/1000 acres, $264,870.00. At page 704 the assessment of ferry waiting room and buildings $8,000, refers to the building referred to as ferry waiting

room north of the entrance from the Clifton drive to the Concourse. The entire ferry racks, platforms, buildings and floats, $116,000, refers to the other structures also at the Weehawken ferry. On page 705 of the same report is the assessment upon the property at West New York ferry,—Ferry house, rack and platform, $20,300. A portion of the added value is comprised in the assessment of Pier number 117, $43,100, a portion of this pier being used for this ferry slip. The valuations in 1904 were practically identical with these.

JAMES J. RUSSELL, a witness produced on behalf of the prosecutor, being duly sworn according to law, testified as follows:

Direct examination.

By Mr. WALL:

Q. What capacity are you employed in by the prosecutor?
A. I am one of the head clerks in the Auditor of Passenger Accounts' office.
Q. And have been for how long?
A. Since March 1st, 1906.
Q. And before that where were you employed?
A. I have been employed in that office as a clerk since July 9, 1888.
Q. Did you make any examination to ascertain the daily average of passengers and vehicles going over the Weehawken ferry?
A. I did.
Q. Did that include the West New York ferry?
A. Yes, sir.
41 Q. What means did you take to investigate that question?
A. The sales of tickets made by ticket agents at Franklin street and West 42nd street and Weehawken; I got my information from their reports of such sales through the New York Central.
Q. And what was the result of your investigation, what did you find that the daily average in 1904 of railroad passengers was?

By Mr. GRIFFIN: Objected to on the ground that the interrogatories submitted to the prosecutor, which are annexed to the return in this case, call for this very information, and the prosecutor by its letter dated May 17th, 1905, furnished information on the subject, and the prosecutor is now precluded from testifying or offering evidence on the subject.

A. The daily average was approximately 5300.
Q. And the trolley passengers?
A. From January 1st to September 30th, 1904, the daily average was approximately 4400.
Q. And foot passengers to September 30th, 1904?
A. Approximately 8600.
Q. And the foot passengers for the period you examined?
A. Foot passengers from September 30th to December 31st, 1904, the daily average was approximately 12,000.
Q. And vehicles?

A. Vehicles daily average for the year 1904 was 1100.

Q. What was the daily average for 1905 of railroad passengers?

By Mr. GRIFFIN: Objected to on the ground that the interrogatories submitted to the prosecutor, which are annexed to the return in this case, call for this very information, and the prosecutor by its letter dated May 17th, 1905, furnished information on the
42 subject, and the prosecutor is now precluded from testifying or offering further evidence on the subject.

A. 6350.

Q. And foot passengers?

A. 13,200.

Q. And vehicles?

A. 1250.

Q. Did you make any examination to determine the receipts from railroad passengers, trolley passengers, foot passengers, vehicles and other freight for the years 1904 and 1905?

A. Yes, sir.

Q. What was the result of that examination?

By Mr. GRIFFIN: Objected to on the ground that the interrogatories submitted to the prosecutor, which are annexed to the return in this case, call for this very information, and the prosecutor by its letter dated May 17th, 1905, furnished information on the subject and the prosecutor is now precluded from testifying or offering further evidence on the subject.

A. The receipts for carrying New York, Ontario and Western Railroad passengers for the year 1904 $6,987.87; trolley passengers from January 1st to September 30th, 1904, $29,997.76; foot passengers, vehicles and other freights $211,407.82. Total receipts for the year $248,393.45.

Q. What were the corresponding figures for 1905?

By Mr. GRIFFIN: Objected to on the ground that the interrogatories submitted to the prosecutor, which are annexed to the return in this case, call for this very information, and the prosecutor by its letter dated May 17th, 1905, furnished information on the subject and the prosecutor is now precluded from testifying or offering further evidence on the subject.

43 A. New York, Ontario and Western passengers $8,532.68; from foot passengers, vehicles and other freights $281,532.84. Total receipts for the year $290,065.52.

Cross-examination by Mr. GRIFFIN:

Q. When you speak of the daily average of railroad passengers, what railroads do you refer to?

A. I referred to passengers that came from the points on the West Shore Railroad destined to New York, and also the passengers from any of our connections over the West Shore Railroad destined to New York.

Q. And what railroads might they be?

A. Well the Lake Shore—there are several connections.

Q. The Ontario is one?

A. Yes, sir, the New York, Ontario and Western is also included.

Q. Now I notice that there is only one railroad of which you have a specific return for moneys paid for the carriage of its passengers.

A. That is the only railroad we received any revenue from the transportation of its passengers.

Q. The Ontario sells through tickets from places along the line of its railroad to and from New York City?

A. Yes, sir.

Q. And the West Shore Railroad, or the prosecutor, charges the New York, Ontario and Western Company a fee for the carriage of its passengers across the river?

A. Yes, sir.

Q. What is that fee?

A. Three cents.

Q. Now as to the passengers who come on the New York Central, or the prosecutor's line, is there any additional charge made for the transportation of a person from some point along the line
44 of its road to the city of New York over and above what you charge to Weehawken?

A. Well to the best of my knowledge and belief they make no charge, but of course that would have to come from information from another department.

Q. Well you know the same fare is charged for the transportation of any person from any place along the line of the road to Weehawken as to New York?

A. With the exception of a few stations up as far as between Weehawken and West Englewood.

Q Now as to stations between Weehawken and West Englewood, does the company charge an additional rate of fare for crossing the river on its boats?

A. Well, yes.

Q. What is it?

A. Well it differs from different stations; I can't recall now the stations.

Q. Well, how much is it?

A. In some cases it is three cents and in another case it is five cents, but I can't say positively which.

Q. Do you know what the rate charge to New York is from West Englewood?

A. No, I do not.

Q. Do you know what it is to Weehawken from West Englewood?

A. No, I do not.

Q. Do you know what additional charge is made to passengers from West Englewood to New York over and above the charge made to Weehawken, or in other words what do they charge him for the ferriage across the river?

A. No, I do not know.

Q. You have spoken about the rate of ferriage charge to the New

York, Ontario and Western as three cents—is that for a single trip across the river?

A. Yes, sir.

Q. To any of the ferry terminals in New York City—is that right?

A. I don't understand the question.

45 Q. The three cents charge covers transportation on all the ferries running from Weehawken to New York City?

A. Yes, sir.

By Mr. WALL: I object to this line of cross examination as being outside of the limits of the direct examination.

Q. Now I notice that you have an item for trolley passengers for the year 1904, but you have none for the year 1905—why is that?

A. Well up to the date given there, September 30th, the West Shore sold tickets reading from New York to points on the Jersey City, Hoboken and Paterson Street Railway—I think that is the name of the company, and they also sold tickets from their stations crossing into New York, but after September 30th that was discontinued.

Q. And what was the price of a single trip ticket to any point on the line of this trolley company, or say from New York to some point in West Hoboken?

By Mr. WALL: I object to that as being outside of the limits of the inquiry and not being embraced within the questions involved in this case.

A. I can't say.

Q. Do you know what the fare was from any point on the Trolley Company's line over your ferry to New York City?

A. No, sir, I do not.

Q. Do you know what charge the ferry company, or the prosecutor, made to the trolley company for carrying its passengers across the river from Weehawken to New York?

A. On one-way passengers it was two and a half cents, and the round-trip passengers five cents.

Q. And that applied to all the ferries?

A. Yes, sir.

Q. In 1904 you have bunched foot passengers and vehicles and other freights and you gave a grand total of receipts: now

46 will you tell us what the amount of the receipts were for the year 1904 from foot passengers alone, that is foot passengers who were not passengers on either your steam railroad or the trolley road on tickets to or from New York?

A. I can't give you that information from the data I have here.

Q. Can you furnish that information to us as to what was received from foot passengers in the year 1905, that is passengers who were not passengers on the trolley or on your railroad?

A. No, sir.

Q. In the year 1905 you say that you had 6,350 railroad passengers daily?
A. Yes, sir.
Q. And daily foot passengers 13,200?
A. Yes, sir.
Q. And vehicles daily 1,250?
A. Yes, sir.
Q. Do you know about what the average charge is for the transportation of vehicles across the river?
A. No, that I don't recall, for it differs to extent.
Q. Well there is about an average is there not?
A. Yes, but I can't give it.
Q. Well, the company has this information at hand, has it not?
A. Yes, sir. The figures I have given as to the aggregate daily average of passengers and as to the aggregate receipts for each year relate to both ferries.

47 HENRY G. LOCHMULLER, a witness produced on behalf of the prosecutor, being duly sworn according to law, testified as follows:

Direct examination by Mr. WALL:

Q. In what capacity are you employed by the prosecutor?
A. I have charge of the Statistical and Bookkeeping Department of the Auditor of Adjustments' Office. I am head clerk.
Q. Have you made any examination as to the expense of operation of the Weehawken and West New York ferries for the years 1904 and 1905?
A. I have.
Q. In what manner did you make that examination?
A. Took it from the records in our office.
Q. And do you know how they are compiled?
A. Yes, sir.
Q. Just describe the data from which you made your examination?
A. The figures which I procured from our records come from various vouchers, pay roll reports, material reports, journal entries and collection vouchers which are passed through our office. The vouchers come there daily and the reports monthly and they are entered in a separate ledger.
Q. And these vouchers are the vouchers for the actual payments made—is that correct?
A. Yes, sir.
Q. Do all or only part of the vouchers that have to do with the expenses for these ferries pass through your office?
A. Every one of them.
Q. What did you do with the data to which you refer in order to make up the statement that you have made up—how did you make up your statement?
A. Why, I took these figures from our books and principally from the reports and vouchers that were entered in the books.

48 Q. And what was the result of that examination?

By Mr. GRIFFIN: Objected to on the ground that the interrogatories submitted to the prosecutor, which are annexed to the return in this case, call for this very information, and the prosecutor by its letter dated May 17th, 1905, furnished information on the subject, and the prosecutor is now precluded from testifying or offering further evidence on the subject; and also on the further ground that witness is using secondary data for the purpose of refreshing his recollection. It is apparent that he can't give the figures from memory, and he should produce here the original data from which he proposes to testify.

A. The total expenses of operating the ferry boats for the year ending December 31st, 1904, was $344,049.23. For the year ending December 31st, 1905, it was $383,861.78.

Q. Do either of these totals you have given include any interest on investments or for dividends?

A. No, sir.

Cross-examination by Mr. GRIFFIN:

Q. Of course you have charged up there something for depreciation in the value of your plant, have you not?

A. No, sir.

Q. Do you mean that that is the out-of-pocket disbursements paid for labor and materials?

A. Yes, sir. The items making up the totals for 1904 and 1905 which I have given are as follows:

For year ending December 31st, 1904:

T 18		Ferry Station Force	$35,668.14
T 32		Ferry Station Expenses	3,653.75
C 12		Repairs Ferry Slips	8.64
W 18		Repairs Ferry Slips	8,756.04
W 21		Dredging Ferry Slips	17.50
M 2		Operating Ferry Boats	215,634.65
	M GA	Ferry Station Expenses	6,220.68
49	M 10	Repairs Ferry Boats	51,503.22
	M 13	Repairs Ferry Slips	89.80
M 21		Rents of Ferry Properties	22,497.31
			$344,049.23

For the year ending December 31st, 1905:

T 18		Ferry Station Force	$35,903.47
T 32		Ferry Station Expenses	3,389.26
W 19		Repairs of Ferry Slips	1,618.93
M 2		Operating Ferry Boats	213,604.63
M-9-A		Ferry Station Expenses	9,964.89
M 10		Repairs of Ferry Boats	96,489.64
M 13		Repairs of Ferry Slips	78.18
M 21		Rents of Ferry Properties	22,812.78
			$383,861.78

WILLARD REILEY, a witness produced on behalf of the prosecutor, being duly sworn according to law, testified as follows:

Direct examination by Mr. WALL:

Q. In what capacity are you employed by the prosecutor?
A. I am chief rate clerk in the passenger department of the West Shore Railroad Company.
Q. As such have you any knowledge of the schedule of rates charged on the ferry?
A. I filed it, but I am not very conversant with it now.
Q. You filed it with who?
A. The Interstate Commerce Commission.

By Mr. GRIFFIN: I object to this on the ground that such information was not furnished to the Freeholders before they fixed the rates or at any other time.

Q. When did you file it?
A. May 29, 1903.
50 Q. Do you know whether this is a copy of the rates as filed (referring to Schedule of Rates produced by witness)?
A. It is.

By Mr. WALL: I offer in evidence copy of the Schedule of Rates charged for passengers and vehicles on the Weehawken Ferry.
Marked Exhibit P. 4.

Q. Do you know whether a copy of that schedule is posted up in the ferry house at Weehawken?
A. Yes, sir; it is.
Q. How about the rate charged on the West New York Ferry?
A. Well, they are the same as this—it is for both ferries—Franklin Street and West 42nd Street and all ferries are the same.

Cross-examination by Mr. GRIFFIN:

Q. Have you filed with the Interstate Commerce Commission any other tariff than this one—this copy Exhibit P. 4?
A. Pertaining to ferries?
Q. Yes.
A. None.
Q. When did you say this was filed?
A. May 29th, 1903.
Q. I don't notice in this tariff any item for the charge of persons who are passengers on the trolley cars on a journey from some point along the line of the trolley to the city of New York or return?
A. That would not be there.
Q. Well it is not there?
A. It wouldn't be there.
Q. Well I say it is not there?
A. No. I can explain that if you want me to.
Q. This tariff also does not show what charge is made on account

of the transportation of passengers on the New York, Ontario
51 and Western Railroad from points along the railroad to New York City or return to such point?

A. No, sir.

By Mr. WALL: I offer in evidence the Certificate of Incorporation of the West Shore Railroad Company, filed in New York December 5th, 1885.

Marked Exhibit P. 5.

Also the lease of the West Shore Railroad Company to the New York Central and Hudson River Railroad Company, filed in New York May 2nd, 1892.

Marked Exhibit P. 6.

Also the agreement between the New York, Ontario and Western Railroad Company and the New York Central and Hudson River Railroad and the West Shore Railroad Company, dated January 18th, 1888, filed with the Register of Hudson county.

Marked Exhibit P. 7.

Also the agreement of merger between the West Shore and Ontario Terminal Company and the West Shore Railroad Company, filed in the Secretary of State's office of New Jersey July 9th, 1901.

Marked Exhibit P. 8.

Also the consolidation agreement between the Hudson River Railroad Company and the New York Central Railroad Company, forming the New York Central and Hudson River Railroad Company, filed — New York November 1st, 1869.

Marked Exhibit P. 9.

Mr. GRIFFIN: The right is reserved to the defendant to note objections later, if it desires, to the offer in evidence of Exhibits P. 5, to P. 9, both inclusive.

52 Mr. WALL: I also offer copies of the laws of the state of New York for 1884, page 223, chapter 193; 1869, page 2399, chapter 917; 1839, page 195, chapter 218, are offered in evidence with the same force and effect as if the duly authorized edition of Statute Laws of the state of New York were offered, subject to correction if any inaccuracies shall appear.

The defendant reserves the right to object to their offer on other grounds than that the law itself had not been legally proven.

Marked Exhibit P. 10.

Adjourned until Friday, October 19th, 1906, at 2 P. M.

Continuation of the Taking of Testimony in the Above Entitled Cause This Nineteenth Day of October, Nineteen Hundred and Six, at Two o'clock in the Afternoon, at the Office of Vredenburgh & Wall, No. 1 Exchange Place, Jersey City, New Jersey, Pursuant to Adjournment.

Appearances:

Messrs. Vredenburgh & Wall, Attorneys of prosecutor.
John Griffin, Esquire, Attorney of defendants.

BENJAMIN C. FESSENDEN, heretofore sworn, being recalled for further examination, testifies as follows:

Direct examination by Mr. VREDENBURGH:

Q. Captain, you lived in Hudson County how long?
A. About thirty years.
Q. And have you been connected with any ferry between New York and Jersey City other than the West Shore ferry?
A. No, sir.
Q. Do you know what other ferries there are in Hudson County between the New Jersey shore and the New York shore?
53 A. Yes, sir.
Q. Please state them commencing at the north?

By Mr. GRIFFITH: Objected to on the ground that no such information was furnished to the Freeholders by the prosecutor at any time before the rates were fixed, or at any other time.

A. One from 14th street, Hoboken, to West 14th street, New York, one from Hoboken to Christopher street, New York, one from Hoboken to Barclay street, New York, one from the Erie railroad in Jersey City to West 23rd street, New York, one from the Erie railroad in Jersey City to Chambers street, New York, one from the Pennsylvania railroad in Jersey City to 23rd street, New York, one from the same place to Desbrosses street, New York, one from the same place to Cortlandt street, New York, one from the Central railroad in Jersey City to Liberty street, New York, one from the Central railroad in Jersey City to the Battery in New York, also one from Bergen Point to Staten Island.
Q. Was there any in 1904 from the foot of Exchange place to Brooklyn?
A. Yes, sir, the Annex Ferry.
Q. Now was there any from the foot of Pavonia avenue, Jersey City, to 14th street, New York?
A. No, sir, I think not—not in 1904.
Q. Was there one from the City of Hoboken to 14th Street, New York, in 1904?
A. Yes, sir, I gave that one.
Q. There is one from 14th Street, Hoboken, to 14th Street, New York?
A. Yes, sir.

Q. And is there not also one from the foot of Pavonia Avenue, Jersey City, to the foot of 14th Street, New York?
A. No, sir.
Q. These ferries have been in existence how long, Captain, all of them?

54 By Mr. GRIFFIN: Objected to on the ground that no such information was furnished to the Freeholders by the prosecutor at any time before the rates were fixed, or at any other time; and secondly, because it is immaterial, irrelevant and incompetent.

A. They have been in operation for a number of years,—ten or more all of them—and some of them of course a great deal longer than that.
Q. And are they well known ferries?
A. Yes, sir.

CLARENCE A. FISHER, heretofore sworn, being recalled for further examination, testified as follows:

Direct examination by Mr. VREDENBURGH:

Q. Mr. Fisher, have you here the deed of the property where the West Shore Railroad ferries are located?
A. Well, I have the grant from the State of New Jersey.
Q. Will you please produce them?
A. Yes. (Witness produces same.)

By Mr. VREDENBURGH: I offer in evidence the grant from the State of New Jersey to the Open Cut and General Store House Company, dated June 10, A. D. 1882, and recorded June 23, 1882, in the office of the Register of the County of Hudson.
Marked Exhibit P. 11.
By Mr. GRIFFIN: I object to the offer of the instrument on the ground that it is immaterial, irrelevant and incompetent, and also on the ground that there was no such evidence presented to the Freeholders prior to the fixing of the rates, or at any time before the present time.

55 By Mr. VREDENBURGH: I also offer in connection with the grant the map referred to in the grant and attached to it.
Marked Exhibit P. 12.

Q. Do you know, Mr. Fisher, whether the ground occupied by both ferries of the West Shore Railroad at Weehawken are within the lands described in this grant?

By Mr. GRIFFIN: Objected to on the ground that no such information was furnished to the Freeholders by the prosecutor at any time before the fixing of the rates, or at any time before the present time.

A. Yes, sir.

By Mr. VREDENBURGH: I now offer in evidence a certified copy of Articles of Association of the Jersey City and Albany Railroad Company of the States of New York and New Jersey; and the

Agreement of Consolidation between the Ridgefield Park Railroad Company and the Rockland Central Railroad Company; and the Articles of Association of the Jersey City and Albany Railway Company of New York; and the Articles of Association of the Jersey City and Albany Railway Company of New Jersey, filed and recorded September 24, 1879; and the Agreement of Consolidation between the Jersey City and Albany Railway Company of New York, and the Jersey City and Albany Railway Company of New Jersey, filed and recorded in New Jersey, January 25, 1879. The object of this last offer is to show the steps leading up to the formation of the West Shore Railroad Company and the franchises that vested in it.

Marked Exhibit P. 13.

I also offer the joint agreement for the consolidation of the West shore and Buffalo Railroad Company and the North River
56 Railroad Company, bearing date May 12th, 1881, and the certificates connected therewith. This is offered as a length in the chain of title of the ferries.

Marked Exhibit P. 14.

I also offer certified copy of agreement of merger and consolidation between the Ridgefield Park Railroad Company and the Rockland Central Railroad Company, forming a new corporation entitled the Jersey City and Albany Railroad Company, dated May 6th, 1873, and filed in the office of the Secretary of State October 15th, 1873. This is also offered for the purpose of continuing the chain of title.

Marked Exhibit P. 15.

I also offer in evidence an act entitled "An act to incorporate the Ridgefield Park Railroad Company," approved April 4, 1867, Pamphlet Laws of that year, page 720.

Marked Exhibit P. 16.

I also offer a supplement to an act entitled "An act to incorporate the Ridgefield Park Railroad Company, approved April 4th, 1867, which supplement was approved March 24, 1868, Pamphlet Laws of that year, page 467.

Marked Exhibit P. 17.

I also offer a supplement to an act entitled "An act to incorporate the Ridgefield Park Railroad Company," approved April 4, 1867, which supplement was approved March 10, 1869, Pamphlet Laws of that year, page 370.

Marked Exhibit P. 18.

I also offer a further supplement to an act entitled "An act to incorporate the Ridgefield Park Railroad Company," approved April 4, 1867, which supplement was approved March 7, 1873, Pamphlet Laws of that year, page 1,021.

Marked Exhibit P. 19.

57 I also offer an act entitled "An act to enable the Ridgefield Park Railroad Company, a corporation of the State of New Jersey, and the Rockland Central Railroad Company, a corporation of the State of New York, to consolidate their stock, or connect with other companies," which last act was approved March 7, 1873, Pamphlet Laws of that year, page 1,022.

Marked Exhibit P. 20.

I also offer an act entitled "An act to incorporate the Weehawken Ferry Company," laws of New Jersey, 1852, Chapter 167, page 401.

Marked Exhibit P. 21.

By Mr. GRIFFIN: Objected to first on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear what ferry is being chartered by, through or under the charter of the Weehawken Ferry Company; and also on the ground that the charter rights of the Ferry Company have expired.

By Mr. VREDENBURGH: I also offer a supplement to that charter, passed in 1857, page 542, Chapter 211, entitled "A supplement to an act entitled 'An act to incorporate the Weehawken Ferry Company.'"

Marked Exhibit P. 22.

By Mr. GRIFFIN: Objected to first on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such chapter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear what ferry is being operated by, through or under
58 the charter of the Weehawken Ferry Company; and also on the ground that the charter rights of the Ferry Company have expired.

By Mr. VREDENBURGH: I also offer a further supplement to an act entitled "An act to incorporate the Weehawken Ferry Company," approved March 25, 1852, Pamphlet Laws of 1859, page 3, Chapter 1.

Marked Exhibit P. 23.

By Mr. GRIFFIN: Objected to first on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear what ferry is being operated by, through or under the charter of the Weehawken Ferry Company; and also on the ground that the charter rights of the Ferry Company have expired.

Mr. VREDENBURGH: I also offer a statute of the State of New Jersey, entitled "An act to incorporate the National Stock Yard Company," approved March 16, 1869, Pamphlet Laws of that year, page 418, Chapter 159.

Marked Exhibit P. 24.

Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear what ferry is being operated by, through or under the charter of the Weehawken Ferry Company.

By Mr. VREDENBURGH: I also offer a supplement to that charter entitled "A supplement to an act entitled 'An act to incorpo-
59 rate the National Stock Yard Company,'" approved February 23, 1870, Pamphlet Laws of that year, page 310, Chapter 116.

Marked Exhibit P. 25.

Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the charter.

Mr. VREDENBURGH: I also offer in evidence a statute of the State of New Jersey entitled "An act to incorporate the Open Cut and General Store House Company," approved March 22, 1871, Pamphlet Laws of that year, page 706, Chapter 289.

Marked Exhibit P. 26.

Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the charter.

Mr. VREDENBURGH: I also offer a statute of the State of New Jersey entitled "An act to incorporate the Weehawken Transportation Company," approved March 22, 1871, Pamphlet Laws of that year, page 711, Chapter 290.

Marked Exhibit P. 27.

Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears
60 that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the charter.

Mr. VREDENBURGH: I also offer a statute entitled "A supplement to an act entitled 'An act to incorporate the Weehawken Transportation Company, approved March 27, 1871,'" which supplement was approved March 7, 1873, Pamphlet Laws of that year, page 1010, Chapter 152.

Marked Exhibit P. 28.

Mr. GRIFFIN: Objected to first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such charter; and secondly, that it appears that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the charter.

Mr. VREDENBURGH: I also offer a statute of the State of New Jersey entitled "A supplement to an act entitled 'An act concerning corporations, approved April 7, 1875'", which supplement was approved February 21, 1877, Pamphlet Laws of that year, page 22, Chapter 11.

Marked Exhibit P. 29.

Mr. GRIFFIN: Objected to as immaterial, and incompetent, and irrelevant.

Mr. VREDENBURGH: I also offer a statute of the State of New Jersey entitled "An act relating to the consolidation of corporations authorized to establish storehouses, piers or docks, or to maintain yards and buildings for the keeping and accommodation of live

stock." approved March 23, 1883, Pamphlet Laws of that year, page 243.

Marked Exhibit P. 30.

61 Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such statute; and secondly, it appears that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the statute; and also on the ground that the statute mentioned is unconstitutional, null and void.

Mr. VREDENBURGH: I also offer in evidence a statute of the state of New Jersey entitled "An act granting the consent of the legislature to the leasing of the railroad and franchises of the West Shore Railroad Company to the New York Central and Hudson River Railroad Company," approved March 29, 1887, Pamphlet Laws of that year, page 289, Chapter 50.

Marked Exhibit P. 31.

Mr. GRIFFIN: Objected to, first, on the ground that no claim was made before the Board of Freeholders of any rights of the Prosecutor under such statute; and secondly, it appears that the resolution sought to be certified covers several ferries, and it does not appear which ferry is being operated by, through or under the statute; and also for the further reason that the consent of the legislature to this leasing and consolidation was based on the act of 1883, page 243, and being based upon an unconstitutional act, the consent and ratification is void.

62 New Jersey Supreme Court.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Prosecutor,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant.

On Certiorari.

Continuation of the taking of testimony in the above entitled cause, before me, Pierre F. Cook, a Supreme Court Commissioner, this twenty-second day of October, 1906, at 2.30 o'clock in the afternoon, at the office of Vredenburg & Wall, No. 1 Exchange Place, Jersey City, pursuant to adjournment,

Appearances as heretofore.

____ ____,

Supreme Court Commissioner.

JOHN P. NOONAN, a witness produced on behalf of the defendants, being duly sworn according to law, testifies as follows:

Direct examination by Mr. GRIFFIN:

Q. Mr. Noonan, what is your position with the Board of Chosen Freeholders of the County of Hudson?

A. Assistant clerk.
Q. How long have you been Assistant clerk of the Board?
A. About twenty years or more.
Q. Is there any rule or order of the Board of Chosen Freeholders as to the dates of the regular meetings of the board?
63 A. Yes, sir.
Q. What is that rule?
A. Regular meetings on the first Thursday of each and every month during the year.
Q. At what hour?
A. Four o'clock.
Q. Please turn to page 127 of your minutes. I call your attention to two resolutions passed on May 4th, 1905, being the two resolutions set out in the return to the writ of certiorari in this case; were they passed at a regular meeting?
A. Yes, sir, both of them.
Q. Now turn to the meeting of May 16th, page 133. Do you find there the appearance of Mr. Wall for the New York Central in answer to the notice given of the meeting for the purpose of passing on this ferriage question?
A. Yes, sir.
Q. Who made up the note there as to what transpired?
A. I did.
Q. That note correctly sets forth the facts, does it?
A. Yes, sir.
Q. Now turn to the meeting of June 1st, page 138. Do you find there a communication from Mr. Harris, general attorney of the prosecutor?
A. Yes, sir, Albert H. Harris.
Q. That letter was received and read at that meeting, was it?
A. Yes, sir.
Q. And that was a regular meeting of the board?
A. Yes, sir, that was a regular meeting.
Q. Now turn to the meeting of July 6th, 1905. Do you find there two resolutions by Freeholder Dempsey fixing the rates of ferriage?
A. Yes, sir.
Q. Was the meeting of July 6th a regular meeting of the board?
64 A. Yes, sir.
Q. Do you know what the rate of ferriage charged for one person is on the ferries of the Delaware, Lackawanna and Western, called the Hoboken Ferry?
A. Three cents I always paid.
Q. On all their ferries running from Hoboken?
A. Yes, sir.
Q. And do you know what the rate of ferriage charged at the Erie is for one person?
A. The same.
Q. On all their ferries?
A. Yes, sir all their ferries from Jersey City.

Q. Do you know the rate charged at the Pennsylvania ferry at Jersey City on all the ferries landing in the city of New York?
A. Three cents.
Q. There is a cheaper rate, is there not?
A. By a strip ticket, ten tickets twenty five cents. That is on the Pennsylvania; I don't know about the others.

Cross-examination by Mr. VREDENBURGH:

Q. On the ferry from the Pennsylvania to Brooklyn, what is the ferriage—do you know?
A. I think it is ten cents.
Q. Do you know the distance of the Delaware, Lackawanna ferry from Hoboken to Barclay Street?
A. No, sir.
Q. Do you know the distance of the West Shore ferry from Weehawken to Chambers Street?
A. No, sir.
Q. I take it for granted that the minutes about which you have testified to have been returned in the return that was made up in this case?
A. Yes, sir; do you mean the different ferry companies?
Q. No I mean to the writ of certiorari issued to the board there was a return made by the clerk of the board. Now I take it
65 for granted that this reference to the minutes that you have just made in your testimony—that the minutes themselves were all returned in answer to that writ?
A. That I can't answer.

It is admitted that the notice, resolution and communications and matters contained in the return to the writ are the notice, resolutions, communications and matters referred to by this witness in his testimony from the minutes, and such matter need not be duplicated in the printed case.
Testimony closed.

Ex. P. 4.

Weehawken Ferry, from Foot of West 42d Street and Foot of Franklin Street, North River, New York.

Passenger and Vehicle Tariff.

In Effect June 15th, 1888. Revised June 1st, 1903.

Passenger:

Every Passenger on foot and every Passenger in Vehicles in excess of the allowance specified below—		
If over the age of ten years.....	5	cents.
If between the ages of Five and Ten years.....	3	"
Passenger Tickets in Strips of Ten.....	45	"
Commutation Tickets:		
Individual Use, Calendar Month.....	$1.50	

Auto-Trucks:

Single trucks exceeding eleven feet in length, without load and chauffeur	15 cents.
Single trucks, exceeding eleven feet in length, and not exceeding eight feet in width, with load and chauffeur.	18 "

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Double trucks exceeding eleven feet in length, without load and Chauffeur	25 "
Double trucks, exceeding eleven feet in length, and not exceeding eight feet in width, with load and Chauffeur	38 "

Automobile Vehicles:

One-seated Vehicle, two persons	13 cents.
Two-seated Vehicle, three or four persons	25 "
(The same rate to apply for a two-seated Vehicle, one seat of which may be single and one for motorman.)	
Three-seated Vehicle	30 "
Tricycle Motor, one person	10 "

Cart or Wagon:

Not exceeding eleven feet in length and with load not exceeding eight feet in width, with One Horse and Driver	13 "
Not exceeding eleven feet in length and with load not exceeding eight feet in width, with Two Horses and Driver	25 "

Cart, Wagon or Truck:

With load exceeding eight feet and not exceeding nine feet in width, with One Horse and Driver	25 "
With load exceeding eight feet and not exceeding nine feet in width, with Two Horses and Driver	50 "
With load exceedings nine feet and not exceeding ten feet in width, with Two Horses and Driver	$1.00

Cattle in Droves:

Each including Man in charge	15 cents

Coach or Cab:

With One Horse and Driver, with Two Passengers	15 cents.

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Coach.

With Two Horses and Driver, with Four Passengers	30 cents.
With Two Horses, including Driver and Passengers, for round trip (good only on day of issue and for funerals only)	50 "

Coal Wagon:

Not exceeding seven feet in length and not exceeding three feet in width, with load and One Horse and Driver	13 cents.
Not exceeding eight feet in length and not exceeding four feet in width, without load and Two Horses and Driver	25 "
Not exceeding eight feet in length and not exceeding four feet in width, with load and Two Horses and Driver	38 "
Not exceeding twelve feet in length and not exceeding five feet in width, without load and Three Horses and Driver	31 "
Not exceeding twelve feet in length and not exceeding five feet in width, with load and Three Horses and Driver	44 "

Cow, or Cow and Calf:

With One Person in charge	15 cents.

Furniture Van:

Without load, Two Horses and Driver	25 cents.
With load, Two Horses and Driver	50 "
Hand-Cart	5 cents.

Horse:

With One Person in charge	9 cents.
Horses (extra) in Teams or Droves, each	6 cents.

Lager Beer Wagon:

With Two Horses and Driver	38 cents.

Light Pleasure Vehicle:

With One Horse and Driver, with One Passenger	13 cents.
With Two Horses and Driver, with Two Passengers	25 "

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Machinery Truck:

With small Skid, without load, Two Horses and Driver.	38 cents.
With large Skid, without load, Two Horses and Driver.	50 "
With Small Skid, with load not exceeding six thousand pounds, Two Horses and Driver	50 "
With large Skid, with load not exceeding six thousand pounds, Two Horses and Driver	$1.00
For each additional ton or fractional part thereof, in excess of six thousand pounds	$1.00
Sheep or Hogs in Droves, each	3 cents.

Stone Wagon:

Regardless of size, without load, including Driver	25 cents.
Regardless of size, with load, including Driver	50 "

Timber Vehicle:

With load not exceeding twenty feet in length, One Horse and Driver	18 cents.
With load not exceeding twenty feet in length, Two Horses and Driver	38 "
With load exceeding twenty and not exceeding thirty feet in length, One Horse and Driver	38 "
With load exceeding twenty and not exceeding thirty feet in length, Two Horses and Driver	50 "
With load exceeding thirty and not exceeding forty feet in length, One Horse and Driver	50 "
With load exceeding thirty and not exceeding forty feet in length, Two Horses and Driver	75 "

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With load exceeding forty and not exceeding fifty feet in length, One Horse and Driver	75 "
With load exceeding forty and not exceeding fifty feet in length, Two Horses and Driver	$1.00
With load exceeding fifty and not exceeding sixty feet in length, One Horse and Driver	$1.00
With load exceeding fifty and not exceeding sixty feet in length, Two Horses and Driver	$1.50
With load exceeding sixty and not exceeding seventy-five feet in length, One Horse and Driver	$1.25
With load exceeding sixty and not exceeding seventy-five feet in length, Two Horses and Driver	$1.75
With load exceeding seventy-five and not exceeding ninety feet in length, Two Horses and Driver	$2.00

Timber Vehicle (Empty):

Not exceeding twenty feet in length, One Horse and Driver	15 Cents.
Not exceeding twenty feet in length, Two Horses and Driver	25 "
Exceeding twenty and not exceeding thirty feet in length, One Horse and Driver	25 "
Exceeding twenty and not exceeding thirty feet in length, Two Horses and Driver	30 "

Wagon:

Exceeding eleven feet in length, Truck or Ice Wagon without load, with One Horse and Driver	15 cents.
Exceeding eleven feet in length, Truck or Ice Wagon with load, not exceeding eight feet in width, One Horse and Driver	18 "

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Exceeding eleven feet in length, Truck or Ice Wagon without load, Two Horses and Driver	25 "
Exceeding eleven feet in length, Truck or Ice Wagon with load, not exceeding eight feet in width, Two Horses and Driver	38 "

Wagon or Truck:

Loaded with Furniture, Loose Hay or Loose Straw, One Horse and Driver	25 cents.
Loaded with Furniture, Loose Hay or Loose Straw, Two Horses and Driver	50 "
Loaded with Baled Hay or Straw, One Horse and Driver	25 "
Loaded with Baled Hay or Straw, Two Horses and Driver	38 "
Wheelbarrow	3 cents.

Vehicle without Horse half above rates. Where rates include driver only, regular rates will be charged other occupants of carriage, coach or other vehicle.

Package Tickets:

Tickets for One-Horse Carriage, Wagon or Cart, in Packages of Fifty	$6.00
Tickets for One-Horse Truck, without load, in Packages of Fifty	6.75
Tickets for One-Horse Truck, loaded, in Packages of Fifty	7.50
Tickets for Two-Horse Truck, without load, in Packages of Fifty	11.25
Tickets for Two-Horse Truck, loaded, in Packages of Fifty	$15.00
Tickets for Stone Wagon, loaded, in Packages of Fifty	20.00
Tickets for Stone Wagon, without load, in Packages of Fifty	11.25
Foot Passenger Tickets, in Strips of Ten	.45

71 One-Horse Wagon Tickets will be accepted at a valuation of 13 cents; One-Horse Truck Tickets, light, at 15 cents; One-Horse Truck Tickets, loaded, at 18 cents; Two-Horse Truck Tickets, light, at 25 cents; Two-Horse Truck Tickets, loaded, at 38 cents; Stone Wagon Tickets, light, at 25 cents; and Stone Wagon Tickets, loaded, at 50 cents; in payment for transportation of any character at rates named in above tariff.

Light and Loaded Vehicles.—Vehicles carrying a single bale of hay, a single sack of feed, not more than five empty barrels (other than ale or beer barrels), or empty boxes or sacks used solely to transport merchandise, are classed as "light," and charged accordingly.

Vehicles carrying merchandise, in whatever quantity, other than that excepted above, will be classed as "loaded," and charged accordingly.

Loads exceeding 13 feet in height will not be carried under any circumstances.

Package Tickets will be sold at ticket offices: Depot foot of West Forty-second Street, Depot foot of Franklin Street, North River.

C. E. LAMBERT,
General Passenger Agent,
No. 7 East 42d St., New York.

400. 5-19-03.
Weed-Parsons Printing Co., Albany, N. Y.

72 New Jersey Supreme Court.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant.

On Certiorari.

Rule Setting Aside Resolutions.

This court having heard the argument of counsel and inspected the resolutions of the Board of Chosen Freeholders of the County of Hudson; and the proceedings removed by the writ in this cause, and having duly considered the reasons filed,—

It is ordered that said resolutions brought up by the writ in this cause be and the same are hereby set aside with costs.

Entered May 6th, 1907.

On motion of Vredenburgh & Wall, Attorneys.

73 NEW JERSEY, *ss:*

The State of New Jersey to the Justices of our Supreme Court of Judicature, Greeting:

[SEAL.] Because in the record and proceedings, and also in the giving of judgment in a certain plaint, which was before you, between The New York Central & Hudson River Railroad Company, prosecutor, and The Board of Chosen Freeholders of the County of Hudson, defendant, (which judgment ordered that the resolutions brought up by the said writ be set aside with costs) manifest error hath intervened to the great damage of the said The Board of Chosen Freeholders of the County of Hudson, as is said; we being willing that the error, if any there be, should in some manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid and all things concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-third day of September instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the laws and customs of the State of New Jersey, ought to be done.

Witness, Hon. William J. Magie, our Chancellor, and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the ninth day of September, A. D., One thousand nine hundred and seven.

S. D. DICKINSON, *Clerk.*

JOHN GRIFFIN, *Attorney.*

74 *The Answer of the Justices of the Supreme Court Within Named.*

The record and proceedings of the plea whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes, within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

WM. S. GUMMERE, *C. J.* [SEAL.]

75 Filed Sept. 24, 1907.

New Jersey Court of Errors and Appeals.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Prosecutor, Defendant in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant Below, Plaintiff in Error.

Assignments of Error.

And afterwards, that is to say, on the twenty-third day of September, nineteen hundred and seven, in the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, comes the defendant below, The Board of Chosen Freeholders of the County of Hudson, by John Griffin it- attorney, and says that in the record and proceedings aforesaid, and also in the giving of the judgment and verdict aforesaid, there is manifest error in this, to wit:

First.

That the judgment of the Supreme Court of the State of New Jersey was entered in favor of The New York Central & Hudson River Railroad Company, prosecutor, and against The Board of Chosen Freeholders of the County of Hudson, defendant; whereas, by the law of the land, the judgment should have been in favor of the defendant, The Board of Chosen Freeholders of the County of Hudson, and against The New York Central & Hudson River Railroad Company, prosecutor.

76 Second.

That the judgment of the Supreme Court of the State of New Jersey ordered that the resolutions brought up by the writ in this cause be, and the same are set aside with costs; whereas, by the law of the land, said court should have dismissed said writ with costs to the defendant, The Board of Chosen Freeholders of the County of Hudson.

Third.

That the judgment of the Supreme Court of the State of New Jersey was entered in favor of the New York Central & Hudson River Railroad Company, prosecutor, and against The Board of Chosen Freeholders of the County of Hudson, defendant, setting aside the resolutions brought up by the writ in this cause with costs; whereas, by the law of the land, judgment should have been entered in favor of the defendant, The Board of Chosen Freeholders of the County of Hudson, and against The New York Central & Hudson River Railroad Company, prosecutor, dismissing said writ with costs.

Wherefore, the said The Board of Chosen Freeholders of the County of Hudson, plaintiff in error, prays that the judgment aforesaid, for the errors aforesaid, may be reversed and for nothing holden, and the said The Board of Chosen Freeholders of the County of Hudson, defendant below, plaintiff in error, may be restored to all things which it has lost by reason of and on occasion of the said judgment, and that the prosecutor below, defendant in error, may rejoin to said errors.

JOHN GRIFFIN,
Attorney for Plaintiff in Error,
15 *Exchange Place, Jersey City, N. J.*

Assignments of error served and acknowledged Sept. 24, 1907.
Common joinder in error filed Oct. 12, 1907.

77 New Jersey Supreme Court, November Term, 1906.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.
VS.
THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

Argued November 12, 1906.
Decided February 25, 1907.

1. The act of February 6, 1799 (G. S. 1469) does not suffice to authorize the Chosen Freeholders of Hudson County to fix the rates of ferriage of foot-passengers from New Jersey to New York.

2. The regulation of rates of ferriage of foot-passengers across the Hudson River from New Jersey to New York, is a regulation of interstate commerce and beyond the power of New Jersey under the federal constitution.

3. The power of Congress over interstate commerce is paramount, and has been exercised by the act to regulate commerce of February 4, 1887.

4. Chosen Freeholders of Hudson vs. State, 4 Zabriskie 718, distinguished.

Certiorari.

Before Justices Hendrickson, Swayze and Trenchard.

Albert C. Wall (James B. Vredenburg, and Thomas Emory of New York, on his brief for the prosecutors).

John Griffin, for the Defendants.

The Opinion of the Court was delivered by

SWAYNE, *J.*:

This case involves the validity of resolutions of the Board of Chosen Freeholders of the county of Hudson fixing the rates of ferriage for the transportation of foot passengers between the county of Hudson and the state of New York. One resolution fixes
78 the rate of ferriage for the round trip, and the other for the trip from New Jersey to New York. The action of the Board of Freeholders was taken under the authority of the act of February 6, 1799, G. S. 1469.

The proofs show that the ferry boats are run to connect with trains on various railroads running through New Jersey from points in the state of New York to a terminal station at Weehawken, and are used by passengers on the railroads to and from New York. They are used also by persons not passengers on the railroads, for the purpose of crossing the Hudson River from Hudson county to the city of New York.

The resolutions are not in terms limited to the latter class of persons. Foot-passengers may mean those who arrive at Weehawken by rail from points outside of the state of New Jersey, and enter the ferry from the railroad station, as well as those who enter from Weehawken without having been passengers on the railroads. The natural construction of the resolutions does not limit their application to foot passengers from Hudson County; the words "from Hudson county" evidently relate to the transportation and do not seem intended to qualify the class of passengers. If this is the proper construction, the resolutions certainly are a regulation of interstate commerce, at least as to the rate of ferriage for passengers destined from points out of New Jersey to New York, or from New York to points out of New Jersey. The transportation of passengers is commerce as much as the transportation of goods. Gibbons v. Ogden, 9 Wheaton, 1. Passenger Cases, 7 How. 283. Such regulations of that commerce are beyond the power of the state. Wabash, St. Louis and Pacific Ry. Co. v. Illinois, 118 U. S. 557.

Assuming however that the only object of the resolutions was to regulate ferriage from Hudson county of persons not passengers by rail, we have still to inquire whether they are within the power of the Freeholders in view of the commerce clause of the federal constitution.

The authority of the Freeholders was sustained by the court of errors and appeals in Chosen Freeholders of Hudson vs. State, 4 Zab. 718, decided in 1853, and this case is relied upon by the defendants. It differs, however, materially from the present case. The attempt there was to regulate the rates of ferriage to be taken at the ferry in Jersey City, and the supreme court and court of errors and appeals sustained the regulation upon the theory that the ferry meant the wharf and establishment set up at the terminus within this state. 3 Zab. 212; 4 Zab. 722, 724, where Judge Elmer drew the distinction between a ferry establishment and the way across the water. Both in the supreme court and court of errors it was recognized that the power of New Jersey was limited by the state

line and did not extend so far as to permit the regulation of rates within the boundaries of New York. The resolutions now before us purport to regulate the entire cost of transportation across the river. There is an obvious difference between fixing a rate to be taken at the ferry in Jersey City, which leaves it open for New York to fix a rate on its side of the river and for the owner of the ferry to charge the sum of the two rates for transportation, and fixing a rate which shall be operative in the jurisdiction of another state.

79 Another distinction is that in the former case the ferry seems from the report to have been distinct from the railroad, although it was kept by the railroad company. It is common knowledge that there has been a great development and change in this respect in the last fifty years, and in the present case, the ferry instead of being separate and distinct from the railroad, is in fact a continuation thereof, forming a necessary link in the line of communication between the city of New York and other portions of the state of New York.

Not only is the case of Chosen Freeholders of Hudson vs. State distinguishable from the present, but its authority has been greatly shaken by a subsequent decision of our own court eleven years later. Erie Railway v. State, 2 Vr. 531. That case involved the power of New Jersey to impose a tax on goods in transit across the state. In the supreme court, the tax was sustained, and Chosen Freeholders of Hudson v. State was relied on as authority. State v. D. L. & W. R. R. Co. 1 Vr. 473. The judgment was reversed and an opinion delivered by Chief Justice Beasley which ignored entirely the older case. The failure of the Chief Justice to refer to the case is most significant. If Chosen Freeholders of Hudson v. State is an authority in favor of the right to regulate the rate for the transportation across the river, it is difficulty to see why the same principle would not permit New Jersey to impose a tax upon goods in transit. The case was pointedly called to the attention of the court of errors and appeals by the opinion of the supreme court, and the fact that it was ignored by the Chief Justice indicates either that he did not consider it an authority for the broad proposition above stated, or that he intentionally disregarded it. In either view, its binding force upon us is, to say the least, much weakened.

Since, however, the question raised in the present case involves the power of the state under the federal constitution, our court of errors and appeals is not the court of last resort. For an authoritative decision, we must look to the supreme court of the United States. Questions similar to the one before us have frequently arisen and been much debated since 1853. It would not help the discussion to refer to the numerous cases, and we confine ourselves to those which relate directly to ferries. We find it convenient to state them in chronological order.

In Fanning vs. Gregoire, 16 How. 524, decided in 1853, Fanning claimed an exclusive right under an act of the legislature of the territory of Iowa to maintain a ferry across the Mississippi River at Dubuque for twenty years. Before the twenty years had expired,

the city of Dubuque, acting under the authority of its charter, granted a license to Gregoire for a ferry at the same place. Thereupon Fanning filed a bill for injunction, which was denied. The question of the effect of the power of congress over inter-state commerce was touched upon only incidentally by the court, and it was held that this power did not interfere with the police power of the state in granting ferry licenses.

In 1862 the case of Conway vs. Taylor, 1 Black 603, was decided. In that case Taylor claimed a ferry franchise across the Ohio River from Kentucky to Ohio. Conway and his associates under-
80 took to establish a ferry at the same point and obtained a ferry license under the laws of Ohio. The court of appeals of Kentucky held that the exclusive right of ferrying from the Kentucky side was in Taylor, but that the lower court was wrong in enjoining Conway from ferrying passengers from the Ohio side of the river. The decree of the Kentucky court of appeals was affirmed. The extent to which the court went is shown by the following extracts from the opinion of Mr. Justice Swayne: "There has been now nearly three quarters of a century of practical interpretation of the constitution. During all that time, as before the constitution had its birth, the states have exercised the power to establish and regulate ferries; congress never. We have sought in vain for any act of congress which involves the exercise of this power. That the authority lies within the scope of that immense mass of undelegated powers which are reserved to the states respectively, we think too clear to admit of doubt. We place our judgment wholly upon that ground." He also said: "Undoubtedly the states in conferring ferry rights may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character."

In 1883, Wiggins Ferry Company vs. East St. Louis, 107 U. S. 365, was decided, and it was held that the city of East St. Louis in Illinois might impose a license fee upon a ferry company for each boat plying between that city and the Missouri side of the river. The tax was sustained as an exercise of the police power, upon the authority of Fanning vs. Gregoire, and Conway vs. Taylor.

In 1885, Gloucester Ferry Company vs. Penna. 114 U. S. 196, was decided, and it was held that the state of Pennsylvania could not impose a tax upon the capital stock of the Gloucester Ferry Company, a corporation of New Jersey, engaged in the transportation of persons and property between Gloucester and Philadelphia. It was sought to sustain the tax because the Ferry Company landed and received passengers and freight at its wharf in Philadelphia, and was therefore doing business within the state of Pennsylvania, but the court said that the business of receiving passengers and freight at the wharf in Philadelphia "is a necessary incident to—indeed, it is part of—their transportation across the Delaware River from New Jersey. Without it, that transportation would be impossible. Transportation implies the taking up of persons or property

at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation." Justice Field added: "It needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states. It
81 was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

In 1894, in Covington and Cincinnati Bridge Company vs. Kentucky, 154 U. A. 204, it was held by a majority of the court that an act of Kentucky regulating the tolls over a bridge across the Ohio River between Covington and Cincinnati was invalid because it was an attempted regulation of inter-state commerce. The bridge was held to be an instrument of commerce in the same sense as a ferry, and the Gloucester Ferry Company case was relied upon as authority. Throughout the opinion, ferries and bridges are treated as governed by the same rule in this respect, and the argument suggested by Justice Field in the Gloucester Ferry Company case that the regulations of the two states might conflict, and that Congress alone could harmonize the differences and enact a uniform scale to be operative in both directions, was very much relied upon. The minority of the court, while concurring in the result, took a somewhat narrower view and held that the several states had power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state or between two adjoining states, subject to the paramount authority of Congress over inter-state commerce, but they reached the same result as the majority, for the reason that the acts of Ohio and Kentucky for the incorporation of the bridge company constituted a contract between the corporation and both states, which could not be altered by the one state without the consent of the other.

The whole subject was reviewed in the recent case of St. Clair County vs. the Interstate Transfer Company, 192 U. S. 454, decided in 1904. That case however did not involve the question now in controversy, for it was held that the traffic of the defendant did not constitute a ferry in the strict technical sense of the transportation of persons with or without property, since the transportation by the Interstate Transfer Company was of railroad cars only. The court was, however, careful to say: "Because we have, arguendo, rested our conclusion in this case upon the assumption that the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states, we must not be under-

stood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in Fanning vs. Gregoire, and Conway vs. Taylor, has not been modified by the rule subsequently laid down in the Gloucester Ferry case and the Covington Bridge case. As this case has not required us to enter into those considerations, we have not done so."

Whether these cases are consistent with each other is not for us to decide. It may be that the establishment of ferries in the narrow sense of the word, and the licensing of the boats, are an exercise of the police power of the states, and the regulation of the rates of ferriage, a regulation of commerce. It is enough for our present purpose that the later decisions consistently deny the power attempted to be exercised by the states. We are unable to distinguish the regulation of rates for ferriage from the regulation of tolls on a bridge. A ferry boat is quite as much an instrument of commerce as a bridge, and it was so treated in Covington and Cincinnati
82 Bridge Co. vs. Kentucky. This case is binding on us as an authoritative interpretation of the federal constitution, and we think is itself sufficient to settle the present controversy. But in view of the suggestions of the opinion of the supreme court of the United States in St. Clair County vs. Interstate Transfer Company we have considered the case in the light of reason as well as of authority. The reasons which led the court of errors and appeals to declare invalid the tax on goods in transit, apply with greater force to the rates for ferriage across an interstate river, since the power of taxation may be exercised entirely within the limits of the state, while the regulation of rates for ferriage across an interstate river necessarily extends beyond the state line. If one state has power to fix such rates, it may fix them so as to obtain an advantage over its sister state; and since that state must have the same power, the effect would be to bring about the very conflict between states which the federal constitution was meant to prevent, as was so well said by Chief Justice Beasley in the case already referred to. Indeed Judge Elmer, in Chosen Freeholders of Hudson v. State, as we already said did not go so far as to attempt to vindicate the right of New Jersey to regulate beyond its own boundary. That case and the other cases above cited, that upheld the state legislation as an exercise of police power, rest upon grounds not applicable to the case before us. In Conway vs. Taylor the court expressly said that a ferry was in respect of the landing place and not of the water; the water might be to one and the ferry to another; and that the franchise was confined to the transit from the shore of the state. The same view of a ferry was taken in Columbia Delaware Bridge Co. v. Geisse, 9 Vr. 39; affirmed 9 Vr. 580, in which case, however, the court had to deal only with a ferry franchise.

There is nothing in these cases inconsistent with our present conclusion. The resolutions before us attempt to do more than regulate the transit from the shore of New Jersey; one seeks to regulate the cost of transportation to the shore of New York; the other to regulate the cost for the round trip. The latter resolution is inconsistent even with Conway vs. Taylor, which conceded that Kentucky could not

regulate a ferry from the Ohio shore; and both resolutions belong to the class of laws which Justice Swayze in that case said might so infringe the commercial power of the nation that it would be the duty of the court to annul or control them.

The argument based upon the view that a ferry means merely the landing place is not applicable to a situation like the present where the ferry is a mere link in a great line of communication. Even if this link be a ferry in that sense, the regulation of rates of ferriage necessarily is a regulation of interstate commerce. The rates to be charged through passengers by rail must be influenced by the remunerative or unremunerative character of the local traffic. If the rates fixed by the freeholders be limited to local traffic and prove unremunerative, the loss must be made up at the expense of the through traffic, if the rates prove profitable, the rates for through traffic may be less.

If we concede that the resolutions are no more than an exercise of the police power, we are even then met by a serious difficulty. By the treaty between New York and New Jersey, G. S. 3464, New York is given exclusive jurisdiction over the waters of the
83 Hudson River to the low water mark on the New Jersey shore, subject to the right of property of New Jersey to the land under water west of the middle of the river, and to the exclusive jurisdiction of New Jersey over the wharves, docks and improvements on its shore, and all vessels aground on that shore or fastened to such wharves or docks, and subject to the exclusive right of New Jersey to regulate the fisheries on the westerly side of the river. Even these reserved rights of New Jersey are further qualified by a provision that they shall be subject to the laws of the state of New York in relation to passengers, and that navigation be not obstructed or hindered.

The limitation of New Jersey's jurisdiction to vessels aground on its shore, or fastened to wharves or docks, and the express reservation by which even those vessels are subject to the laws of New York in relation to passengers, are a plain indication that New Jersey has no control over vessels actually in transit across the river, and the rates to be charged for transportation of passengers thereon.

Our views are further sustained by the legislation of the congress of the United States. By the act to regulate commerce, it is enacted that the provisions of that statue shall apply to any common carrier engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment, from one state or territory to any other state or territory; and the act defines the term railroad as including all bridges and ferries used or operated in connection with any railroad. 1 Suppl. Rev. St. 529.

The proof in this case shows that the ferry in question is operated by the New York Central and Hudson River Railroad in connection with its railroad, for the transportation of passengers between New York City and points in New Jersey, New York and elsewhere, and that in accordance with the act of Congress, the schedule of rates

charged on the ferry has been filed with the Interstate Commerce Commission. The Act of Congress is applicable, and since Congress has undertaken thereby to regulate the charges for transportation, any right which the state of New Jersey might have conferred originally upon the Board of Freeholders, must yield to the paramount authority of Congress over inter-state commerce. That the power of Congress is paramount was decided by the court and conceded even by the judges who did not concur in the opinion, not only in the Covington Bridge Company case, but in the case of the Wabash, St. Louis and Pacific Railroad Company vs. Illinois, 118 U. S. 557. A further citation of authorities on this point is unnecessary.

The resolutions brought up by this writ should be set aside with costs.

84 [Endorsed:] New Jersey Supreme Court. November Term, 1906. New York Central and Hudson River Railroad Co. vs. The Board of Chosen Freeholders of the County of Hudson. Opinion. Swayze, J. Filed Feb. 25, 1907. Wm. Riker, Jr., Clerk.

85 STATE OF NEW JERSEY:

Court of Errors and Appeals, Mch. Term, 1909.

In Error.

NEW YORK CENTRAL ETC. R. R. Co.
and
FREEHOLDERS OF HUDSON CO.

No. 16 of June Term, 1908.
Date June 14, 1909.
Pitney, C., presiding.
Opinion by Reed, J.

Check List.

	Affirm.	Rever'l
The Chancellor	..	1
" Chief Justice	1	..
Mr. Justice Garrison	..	1
" " Reed	..	1
" " Parker	1	..
" " Bergen	1	..
" " Voorhees	1	..
" " Minturn	..	1
Judge Bogert	..	1
" Vredenburgh	..	1
" Vroom	..	1
" Gray	1	..
" Dill	..	1
Totals	5	8

Filed June 14, 1909. S. D. Dickinson, Clerk.

NEW YORK CENTRAL & HUDSON RIVER R. R., Pros. and Def'ts in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Def'ts and Plaintiffs in Error.

1. The Act of 1799, 2 Gen. Stat., p. 1469, empowered the Board of Chosen Freeholders to fix the rates to be taken at the several ferries within their several counties. The Board of Chosen Freeholders of Hudson County in 1905, by resolution, fixed the rates to be charged at certain ferries in Hudson county for the transportation of foot passengers from Hudson county to New York. These ferries were distinct corporations, but were leased to and operated by a railroad company. Held, that the validity of the resolution fixing rates of ferriage is settled in this court by its decision in State v. Board of Chosen Freeholders of Hudson County, 4 Zab. 718.

2. The line of later cases decided by the Federal Supreme Court ending with the case of St. Clair County v. Interstate Sand & Car Transfer Co., 192 U. S. 415, has not definitely decided that a State cannot fix rates for ferriage from itself to another State; and, therefore, it cannot be regarded as finally decided in the Federal court that the decision in 4 Zab. 718 is in conflict with and is therefore superseded by the Federal decisions.

87 3. The rates fixed by the resolution under review apply only to the passage of foot passengers from Hudson county over technical ferries; and the resolution does not include a fixing of rates chargeable by a railroad company for a passage by a railroad passenger over its road and over ferries, which under the Act of 1903, p. 656, is operating a ferry as an appendage or extension of its road.

4. The Interstate Commerce Act of 1887 does not strip a State of any power to fix rates of ferriage which it theretofore possessed.

5. The treaty between New York and New Jersey, by which New York has exclusive jurisdiction over the waters of the Hudson River does not affect the question of power involved in this case.

Argued at the June Term, 1908.

Mr. John Griffin, for Plaintiff in Error.

Vredenburgh, Wall & Carey, and Mr. Thomas Emory, of the New York bar, for Defendant in Error.

The opinion of the court was delivered by REED, *J.*:

This writ brings up a judgment of the Supreme Court setting aside certain resolutions of the Board of Chosen Freeholders of Hudson County, which resolutions were brought into the Supreme Court by certiorari.

The resolutions were adopted under the authority of the act passed in 1799 (2 Gen. St., P. 146) entitled "An act concerning ferries."

This statute enacts that the Board of Chosen Freeholders shall
88 be and they hereby are empowered and directed to fix the rates to be taken at the several ferries between their respective counties, and the same from time to time to revise, alter, amend or make anew at their discretion."

The Board of Chosen Freeholders of Hudson county on May 4th, 1905, passed a resolution to inquire into the rates of ferries charged at the several ferries within the county of Hudson outside of the cities of Jersey City and Hoboken. After notice given to the different ferry companies, including the defendant in error, and after interrogations were served upon and answered by the defendant in error, and after an investigation of the matter of the rates of ferriage, the Board of Chosen Freeholders, on July 6th, 1905, resolved that the board fix the rates of ferriage to be charged by the companies carrying passengers between Hudson county and the city of New York to the terminal of the said ferries in the city of New York, and from said terminal returning to the county of Hudson, at the rate of six cents for each adult person for the round trip, and four cents for each person under ten years of age. On the same date the board resolved that it fix the rate of ferriage to be charged by the said ferry companies for transportation of foot passengers from the county of Hudson by said ferries to the terminal of said ferries in the State of New York at the rate of three cents for each adult person, and two cents for each person under ten years of age.

The prosecutors and defendants in error—the New York Central and Hudson River R. R. Company—are the lessees and operators of the ferries between Weehawken in Hudson county, New Jer-
89 sey, and Franklin street, New York city; between Weehawken and Forty-second street New York city, and between West New York, New Jersey, and Forty-second Street, New York City.

The Supreme Court held that the above resolutions were invalid upon the ground that the regulation of the rates of ferriage for foot passengers across the Hudson river from New Jersey to New York is a regulation of interstate commerce, over which the power of Congress is paramount.

The question whether under the Federal Constitution the State of New Jersey was excluded from the regulation of tolls to be charged by the ferry companies having one of their termini in the State of New Jersey is thus presented upon this writ of error to this court.

The argument divides itself broadly into two questions—whether the legality of the resolutions, so far as respects the judgment of the courts of this State, has been definitely settled, and second, whether if the question is Stare Decisis in this court, a different doctrine has been pronounced and settled by the Supreme Court of the United States.

The counsel for the plaintiff in error insists that the right to pass the resolution now questioned, was settled by this court in the case of Chosen Freeholders of Hudson County v. State, reported in 4 Zab. 718. In that case, the New Jersey R. R. and Transportation Company, "which company," in the language of Judge Elmer, "carried

on the Jersey City Ferry," prosecuted a writ of certiorari, to
90 bring up a resolution of the Board of Chosen Freeholders in Hudson County, fixing the rates of ferriage to be taken at the Jersey City terminus. In the Supreme Court (3 Zab. 206), as well as in this court, in that case, the power of the State to enact the statute of 1799, and the validity of the resolution passed in conformity with the provisions of that act, were upheld.

The defendants in error insist that the facts in the former case are distinguishable from the facts in the present case in two particulars, either of which deprives the former decision of a controlling force in settling the present question.

It is first insisted that in the former case, the resolution purported only to fix ferriage fees for the carrying of passengers to the State line, while the present resolution fixes carrying fees for passage across the Hudson river to the New York side, and for a return trip.

It is quite clear, however, that the decision in the former case did not go upon the ground that the rates to be charged by the resolution then in question, were confined to the carriage of passengers to the middle of the Hudson river, or to the boundary line between New Jersey and New York.

The depositions taken in that case showed that there was a ferry having one terminus at Jersey City in this State, and the other terminus in New York. The resolution in that case, fixed the rate of ferriage to be taken at Jersey City. State v. Freeholders of Hudson, 3 Zab. 206, in the Supreme Court.

In the statement of facts prefixed to the opinion in 4 Zab.
91 718, in this court, it appears that the reso- of the Board of Chosen Freeholders, fixed the rate of ferriage over the ferry from Jersey City to New York.

Justice Elmer, writing the opinion for this court, said: "I am satisfied that the New Jersey statute applies to all ferries having one terminus in this State; consequently, the Board of Chosen Freeholders have power to fix the rates for those between this State and the City of New York." And the lat-er in his opinion, when the learned Judge came to the discussion of the point that the regulation of the rates of fare for carrying passengers was a regulation of interstate commerce, which belongs to Congress, he, in holding that it was not such a regulation, did not intimate that the resolution was justified because the rates fixed were for a passage to the boundary line of the State. Justice Elmer said this: "That the State may regulate the tolls and fare for turnpikes, railroads, and ferries wholly within its jurisdiction, counsel have not gone so far as to deny. But such regulation will in many cases, affect the commerce among the several States, as much as the regulation of tolls at a ferry directly between two States. A large part of the commerce between Philadelphia and New York, passes by means of the roads and canals through New Jersey, which latter State has always regulated the tolls without question. If the States separately or jointly cannot regulate a ferry between two of them, neither can they authorize the building of a bridge, or prescribe the tolls for passing it. These and like powers

have been exercised by most of the States of the Union without doubt or hesitation, from the adoption of the Constitution to the present day, and are, in my opinion, in no wise repugnant to the provisions of that instrument."

92

So there seems to be no diversity of facts in the two cases in respect to the particular- mentioned.

It is again said that the two cases are distinguishable in this, that in the former case, the ferry, although operated by the New Jersey Railroad and Transportation Company was distinct from the railroad company; while in the present case the ferry is not distinct from the New York Central and Hudson River Railroad Company, but is in fact, a continuation of that railroad.

It is not perceptible, however, wherein the distinction lies. It is true that the number of railroad passengers now crossing ferries is larger than the number of railroad passengers that crossed the ferries in 1851; but so far as appears both ferry companies existed as distinct entities, with the liability of common carriers, and each ferry company was kept by a railroad company, and operated for the use of all passengers, whether railroad passengers or not.

It is again insisted that the case of State v. Freeholders of Hudson County, as a decision, is discredited by a later decision of this court, namely, the Erie Railroad Company v. State, 2 Vr. 531. That case involved the power of the Legislature to impose a direct tax upon goods while in transit through this State, from one to another foreign State. The Supreme Court had held that the power existed, and in the opinion of Justice Haines of that court, the State v. Freeholders of Hudson was cited Arguendo in support of the position that the regulation of fares and tolls upon turnpikes, railroads and ferries, even directly between the States, was wholly within the jurisdiction of the States, and was in no wise repugnant to the provisions of the Federal Constitution.

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In the opinion of C. J. Beasley, delivered in this court, reversing the Supreme Court, the case of the Board of Chosen Freeholders of Hudson Co., v. The State, supra, was not mentioned. The Chief Justice, however, was dealing with the question of taxation upon goods in transit. He was not dealing with the exercise of the police power in regulating exactings by a common carrier.

The question in hand was not whether a State could levy a tax upon interstate commerce, but whether the imposition then under consideration was a tax upon interstate commerce. The tax was in the shape of a transit duty of three cents on every passenger, and two cents upon every ton of merchandise, excepting passengers and freight transported exclusively within the State. The passengers and merchandise upon which the duty was laid, were transported from and to other States across New Jersey.

It was held that the duty was a direct tax upon commerce.

Having reached this result, the conclusion was obvious; for following his line of reasoning in McCullough v. Maryland, 4 Wheat. 316, C. J. Marshall had as early as 1827, in his opinion in Brown v. Maryland, 12 Wheat. 419, declared that the taxing power of the State must have some limits; that if the States may tax all persons

and properties found in their territory, what shall restrain
94 them from taxing goods in their transit through the State, from one port to another, for the purpose of re-exportation? Or what should restrain a State from taxing any article passing through it from one State to another for the purpose of traffic? Or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which the power was given.

From the date of the last decision it was never questioned that a State possesses no power to levy a tax upon the business of interstate commerce.

But the imposition of a tax upon business or capital is not an exercise of the police power; and it was the exercise of the police power with which Judge Elmer was dealing in his opinion in the case of State v. Freeholders of Hudson, under which power, in the language of Judge Cooley, "numerous illustrations might be given of the power of the States to make regulations affecting commerce which are sustainable as regulations of police." Cooley's Cons. Lim., p. 584.

In discussing the question involved in the Erie Railroad case, there was no reason for either approving or disregarding the decision in the Freeholders of Hudson case. Besides, in view of the cases in the Federal Supreme Court previous to 1864, the date when the opinion in the case of the Erie Railroad Co. v. State, supra, was
prepared, it is not conceivable that the Chief Justice for a
95 moment thought of impugning the doctrine laid down in the case of State v. Freeholders of Hudson Co., either by his silence, or otherwise. The cases alluded to were Fanning v. Gregoire and Conway v. Taylor.

In the case of Fanning v. Gregoire, 16 How. 524 (decided in 1853), a question arose respecting the power of the State of Iowa to empower and authorize the city of Dubuque to license certain persons to establish a ferry across the Mississippi river, and fix the rates of ferriage. It was held that a previous grant of the Legislature of the territory of Iowa, was not exclusive, and that the later grant was valid.

In the opinion of Mr. Justice McLean, he said: "The argument that the free navigation of the Mississippi river, granted by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply to this case. Neither of these interfere with the police power of the State in granting ferry licenses. When navigable rivers within the commercial power of the Union may be obstructed, one or both of these powers may be invoked."

In 1861 the case of Conway et al. v. Taylor, Executor, 1 Black, 603, was decided by the Federal Supreme Court. In that case the Legislature of Kentucky had granted ferry rights to one James Taylor from his landing in front of the town of Newport, across the Ohio river, with authority to receive the same fares which were allowed

for transportation from the opposite shore. It was held that this grant was valid; that it could not be infringed by another person setting up another ferry. In vindication of the Kentucky
96 legislation Mr. Justice Swayne said: "Undoubtedly the States in conferring ferry rights, may pass laws so infringing the commercial power of the nation, that it would be the duty of this court to annul them. The contention is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in this case are not of that character. We find nothing in them transcending the legitimate exercise of the power of the State."

And again the learned Judge observed: "There has been now for three-quarters of a century a practical construction of the Constitution. During all that time, as before the Constitution and its birth, the States have exercised the power to establish and regulate ferries—Congress, never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of the immense mass of undelegated powers which are reserved to the States respectively, we think too clear to admit of doubt."

In Conway v. Taylor, supra, Mr. Justice Swayne cited the case of State v. Freeholders of Hudson Co., supra, in support of his conclusions.

So that at the time when the case of the Erie Railroad Co. v. State, supra, was decided, there was nothing in the Federal decisions to suggest that the doctrine announced in State v. Freeholders of Hudson, supra, was in the least doubtful; but on the contrary, the highest Federal tribunal had by its judgments, as well as by its citation of the New Jersey case, indisputably recognized the soundness of its conclusions.

Indeed, as late as 1884 the doctrine of the early cases of
97 Fanning v. Gregoire and Conway v. Taylor, supra, was recognized in the case of Ferry Company v. East St. Louis, 17 Otto, 365. In that case it was held that a State may impose a license fee, either directly or through one of its municipal corporations, upon the keepers of ferries living within the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State across a navigable river, to a landing on the other side.

In that case, it was said by Mr. Justice Woods: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license or tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States; and the act by which this exacting was authorized, will not be held to be a regulation of commerce."

So we think there is nothing to distinguish the present case from that decided in State v. Freeholders of Hudson County, supra.

The next question is whether since the doctrine announced in the last mentioned case, has been exploded by the decisions of the Federal Supreme Court.

From what has been already exhibited, it is quite clear that up to 1884 the decisions of the Federal tribunal were in harmony with the decisions of our court of last resort.

The insistence of the defendants in error is that a line of later cases in the United States Supreme Court has overruled these
98 earlier cases, and has definitely settled the law in that court otherwise; and so settled it, that a regulation of charges for passage over a ferry of the kind now in question, by a State Legislature, directly or indirectly, is a nullity.

If that tribunal has decided that the State legislation of 1799 is inimical to the clause of the Federal Constitution which confers upon Congress the power to regulate commerce with foreign nations, and among the several States, our decision, although of the highest court, must yield to the Supreme Court tribunal. A recognition of this rule, and a cheerful conformity with it is essential to the harmonious operation of our system of dual government. In the application of this rule of Federal judicial supremacy, it is requisite to ascertain with precision whether the validity of the statute is stare decisis in the Federal court.

One reason for the exercise of particular care to see that the question is definitely at rest in that court is, that if by our decision, rights set up under a State statute are annulled because of its supposed conflict with the Federal Constitution, there *is* no appeal; while if the validity of the State statute is affirmed, error lies to the Federal court.

I think it may be taken as settled that the point in question must have been distinctly decided, and that the reasoning, references, illustrations and analogies contained in preceding opinions are not precedents. 26 Cyc. of Law, p. 170.

In the case of Steamboat Company v. Livingston, 3 Cow. 713-731, Woodworth, J., in delivering the opinion of the Court of Errors of the State of New York, in speaking of the force to be given the Federal decisions in Gibbons v. Ogden, 9 Whea. 1, said: "In
99 discussing the general nature of the power to regulate commerce among the States, and the effect of a license to carry on the coasting trade, the right of the State over its internal commerce was considered. But it is nowhere asserted in the opinion delivered, that a license to carry on a coasting trade extended to the commerce of the State purely internal. If from the reasoning we may conjecture, or even think it probable that the supreme tribunal may on a future occasion carry the doctrine to that extent, we are not justified in reversing what has been solemnly and repeatedly adjudged in our own courts on such grounds. It must either be on the ground of an expressed decision by paramount authorities, or that on consideration of new points of view in which the question is presented, we are satisfied our former decisions are erroneous."

So the question now presented is whether the Federal Supreme Court has definitely decided that the doctrine laid down in State v. Chosen Freeholders of Hudson County is erroneous.

The first of the line cases which is relied on by the defendants

in error to exhibit the present attitude of the Federal court is Gloucester Ferry Company v. Penna., 114 U. S. 195, decided in 1885. In this case it was held that the State of Pennsylvania could not impose a tax upon the capital stock of a ferry company; and the want of power was put upon the ground that it was a tax upon interstate transportation. The decision was carefully confined to a denial of the power of the State to tax. Mr. Justice Field did not even cite the cases of Fanning v. Gregoire, supra, and Con-
100 way v. Taylor, supra, but says: "It may be conceded * * * that the privilege of keeping a ferry with a right to take tolls for passengers and freight is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public."

"Pennsylvania has never attempted to exercise its power of establishing or regulating ferries across the Delaware river. Anyone, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferrykeepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question therefore, respecting the tax in the present case, is not complicated by any action of that State concerning ferries."

It is to be observed that while this case declares that the business of the kind then under consideration could not be taxed by the State, the only significance of the decision in the present discussion is to be found in the fact that the court declared the business of ferriage to be interstate commerce. This judicial declaration, however, did not antagonize any fundamental position upon which the decision in the case of the State v. Chosen Freeholders of Hudson was grounded.

It is true that Judge Elmer said in that case: "Whether the power of regulating commerce between the States is to be considered as vested exclusively in Congress, so that the Legislature of the several States cannot constitutionally pass any law upon the subject,
101 although it may not conflict with any existing treaty or law of the United States, has not yet been authoritatively settled by the Supreme Court of the United States. But conceding it to be so, the regulation of tolls on bridges and turnpike roads, and the fares on railroad and ferries, is not in a just sense, a regulation of commerce, and has never been so regarded. It is a part of the general power of police, essential to every State and which could not with safety be, and has not been, surrendered to the general government."

It therefore appears that the conclusions reached by Judge Elmer, was not reached by denying that the business of ferrying was interstate commerce, but by denying that the regulation of the tolls to be charged by a keeper of a ferry residing in this State, was inimical to the power of Congress to regulate commerce.

After the decision in the Gloucester Ferry Co. v. State of Penna. case, Mr. Justice Bradley, in his opinion in the case of Robbins v.

Taxing District of Shelby County, 120 U. S., 489, 1886, after recognizing the want of power in a State to tax interstate commerce, said: "It is also an established principle * * * that the only way in which commerce between the States can be legitimately affected by State laws, is, when by virtue of its police power and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharfs, ferries, and other commercial facilities."

102 The next case is Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S., p. 204, where it was held that a Kentucky statute fixing fares and tolls over a bridge connecting that State with the State of Ohio infringed the Federal interstate commerce clause. The argument was that ferries had been held in the Gloucester Ferry Co. Case, supra, to be an instrument of interstate commerce; and that an interstate bridge was in this respect, similar to a ferry. It was held that there was no power in the State to regulate the rates to be charged for crossing an interstate bridge. In reversing the Court of Appeals of Kentucky, five Judges held that the exclusive power to regulate tolls upon a bridge connecting two States was in Congress; and four Judges were of the opinion that the several States have the power to establish and regulate ferries and bridges and the rates of tolls thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce. The four Judges put their votes for reversal upon the ground that the attempt to regulate the tolls was in violation of the original act of incorporation of the bridge company.

It is to be remarked that in the majority opinion it was observed: "Nor are we to be understood as passing upon the question whether in the absence of legislation by Congress the States may, by reciprocal action, fix upon a tariff which shall be operative upon both sides of the river."

103 Again, in his opinion in this case, Mr. Justice Brown said: "The adjudications of this court with respect to the power of the States over the general subject of commerce, are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the state may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the States cannot interfere at all." In the second class he puts laws for the establishment of ferries, citing Conway v. Taylor, 1 Black, 603, supra.

Then came the case of the County of St. Clair v. Interstate Transfer Company, 192 U. S., 454. This case involved the validity of a statute of Illinois imposing a penalty for running a ferry without a license. The ferry consisted of a certain landing place, some cradles, steamboats, barges, by which the Interstate Sand and Car Train Transfer Company ferried, for hire, railroad cars loaded and un-

loaded, across the Mississippi river from the Illinois to the Missouri shore.

The Federal Supreme Court held that this method of transporting railway cars did not constitute a ferry in its restricted and legal significance. Mr. Justice White in his opinion pointed out the distinction drawn by Judge Shipman in the case of the New York & New England Transfer Co., 14 Blatch. 159, between a boat upon which railroad, passenger and freight cars were run and carried by contract with a railroad from Jersey City to Mt. Haven in New York, and a ferry; and further recited that Judge Shipman, without denying the power of the City of New York to require a license for a ferry operating over the route in question had held that the
104 use of the boat in the manner specified, was not the operation of a ferry. Mr. Justice White further recites the language of Judge Shipman to this effect: "The boat of the defendant is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they may be transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars in connection with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat. It is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boats, and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. * * * Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals, and freight at intervals more or less regular for fare or toll."

After reciting this language of Judge Shipman, Justice White concluded that the transportation of railroad cars in the case before him, was not the maintenance of a ferry in the proper sense of the term, but was business which was essentially interstate commerce. Having reached this conclusion, the learned Justice proceeded to say that: "The only question was, did the county have the power to require the obtaining of a license by the company, as a pre-requisite to the carrying on of such interstate commerce, and to impose the penalties sued for because a license had not been obtained?" The conclusion was that the county did not have this power. But the absence of the power was put upon the ground that such illegal conditions had been attached to the right to obtain the statutory
105 license, as relieved the company from the duty of complying with them.

The first of these conditions was that in granting a license, citizens of Illinois were entitled to preference. The second of these illegal conditions was that the acceptance of the license imposed an absolute obligation upon the applicant to carry on a general ferry business as a pre-requisite to its right to carry on its business of transporting cars; and so there was thus imposed a burden upon the latter business, which business was that of interstate commerce.

It is perceived that it was not decided that a license might not have been required by the State for the carrying on of interstate commerce; for the court having arrived at the conclusion that the

license required was by reason of its discriminatory and burdensome accompaniments illegally exacted, the question of the right to exact any license at all, disappeared.

The opinion concludes with a caveat against any inference being drawn from the language of the opinion, that it was intended to decide that the cases of Fanning v. Gregoire and Conway v. Walker, supra, had not been modified by later decisions, the Judge remarking that the question had not been considered, because unnecessary to the decision of the case before them.

Now so far as appears, the Ferry Company which figures in the present case, was entirely unlike the corporation concerned in the St. Clair v. Interstate Transfer Company case.

The Weehawken Ferry Company seems to have been incorporated in 1852, with the usual privileges of a ferry company. Its business is the transportation of passengers and vehicles, as is that of
106 any other ferry company. The railroad company as lessee, is the keeper of the ferry, and obliged to conduct the business of the ferry. There is no ground disclosed in the record which puts it upon the same footing as the Interstate Transfer Company.

Regarding it as a ferry, or as a ferry similar to the Gloucester Ferry, the question is whether it has been definitely settled by the Federal Supreme Court that the regulation of its tolls, charged by its keeper in New Jersey, is not a subject for regulation by the State of New Jersey.

It may be admitted that the logical inferences to be deduced from the later Federal decisions, are in favor of the view that when the precise question arises in the Federal tribunal, it will be held that the right to regulate tolls for the use of a ferry, like the one in question, resides alone in Congress; and if the present question was new in this State, the line of reasoning in the learned opinion delivered in our Supreme Court in this case would be strongly in that direction. But in the face of the adjudication in our court of last resort, made over fifty years ago, I think we should take no step in that direction beyond that taken by the Federal Court in actual decisions.

The Supreme Court of the United States, in dealing with this phase of interstate commerce, has had to recognize conditions which have sprung into existence, or increased in relative importance, within the last few years. In the light of these conditions, it has thought it wise to restate, modify, explain and adjust former statements, so as to meet with novel, and shifting situations. It has done so respecting the position of interstate bridges and ferries in relation to interstate commerce. But in executing this deli-
107 cate function, it has proceeded with cautious steps. It has decided nothing aside from what was absolutely essential to dispose of each case as it arose. It has decided that a ferry like the Gloucester Ferry, conducted a business of interstate commerce, as far as respected its immunity, from State taxation; that an interstate bridge is like a ferry, an instrument for executing interstate commerce, and that a State cannot regulate the tolls over bridges. Nevertheless, it has expressly refrained from saying whether two States may not, by reciprocal action, fix a rate for tolls; and has refrained

from saying that a State may not exact a license for operating a technical ferry. As no distinction is suggested between the exaction of a license and the fixing of tolls, so far as concerns the power to regulate commerce, it follows that there has been no decision which, except argumentatively, denies the power of the State to supervise the charge for ferriage.

In the St. Clair Co. case, if the court had understood that former cases had definitely established the proposition that interstate transportation of all kinds, whether known as ferries or otherwise, was immune from any State requirement of a license, that alone would have decided the case; but as already observed, the decision was put upon a ground which left open the question of the right of the State to require licenses for the operation of a technical ferry.

The importance of distinguishing between the acceptance as a finality that which has been distinctly decided, and in accepting, on the other hand, that which, by the logic of previous decisions,
108 ought to be decided, is suggested by the remark of Lord Chancellor Halsbury in delivering his judgment in the House of Lords, in the case of Quinn v. Leathem, 1901, A. C. 495, to the effect that the latter course assumes that the law is necessarily a logical code; whereas every lawyer must acknowledge that the law is not always logical at all; the propriety of the former course is also suggested by the Federal Supreme Court's careful circumscription of its latest decisions.

That the last word has not been said upon the subject in hand by the Supreme Court of the United States, is the opinion of a late writer on the regulation of commerce under the Federal Constitution. Mr. Calvert, on page 207 of his book upon that subject, remarks: "The extent of the power of States to authorize and regulate ferries, has not been clearly determined. Power to regulate ferries over waters entirely within their limits is one that may be exercised exclusively by the States; but whether a State may license and regulate ferries over waters separating two States is still a debatable question." He then alludes to Mr. Justice White's concession arguendo in the St. Clair County case, and his definition of a ferry in the strict sense as confined to the transportation of persons, with or without their property, and his intimation that the doctrine of the early cases had been modified.

My conclusion is that the decision of this court in the case of State v. Chosen Freeholders of Hudson County, which case controls the present, has not been overruled by the Supreme Court of the United States in any decision which makes the present question res decisa in that Court.

109 It is again insisted that the regulation by the State of New Jersey is excluded because Congress has legislated concerning ferries operated in connection with railroads. The Congressional legislation thus alluded to is said to be contained in the Interstate Commerce Act of 1887 and the amendments thereto; but all interstate commerce is not included within the operation of that statute. A ferry is not included. It is true that when a railroad company uses and operates a ferry, the latter as a part of the railroad becomes

subject to the Commissioners' control over railroads. (Judson on Interstate Commerce, Secs. 104-105). The rates charged by a railroad company for passage over its route may be regulated, but the rates charged for ferriage simply, disconnected from the railroad transportation, is not under the control of the Commission. Indeed, upon neither had the Commission the power to fix rates until the amendment to the Interstate Commerce Act, which amendment was approved June 29th, 1906, and so cannot affect the decision of this case, because not in existence when the certiorari in this case was sued out on May 1st, 1906.

Whether under the amendment of 1906 the power conferred upon the Commission is not to fix rates—but to correct rates when inequitably fixed (1 Drinker, Interstate Commerce Act, p. 392, Sec. 271), need not be discussed.

It is pointed out in the opinion of the Supreme Court that the treaty between New York and New Jersey (3 Gen. Stat. P. 3464), granted to the State of New York exclusive jurisdiction over the waters between the terminal points of these ferries, and so excludes any exertion of power by New Jersey in regulating, in any way, vessels moving upon those waters. It would seem, however, that whether the jurisdiction of the State of New York runs to
110 the middle of the Hudson river, or to the New Jersey shore, it would not affect the question now involved. The ferry house is within the jurisdiction of New Jersey and it is the right of the State to regulate the charges which the keeper of such ferry house may impose for transportation to New York, that is involved. Now whether the transportation is partly or wholly over waters of the State of New York seems to be immaterial, for in the one case, as in the other, the transportation would be interstate commerce.

But apart from this, it is to be observed, that the agreement entered into between the Commissioners was ratified by the Legislature of New Jersey in 1834. It had been in existence, therefore, nearly twenty years when the case of State v. Chosen Freeholders of Hudson Co., supra, was decided, although this point was not noticed by either counsel or court in that case.

We would hardly, on that ground, disturb a decision so well considered, which has stood for over half a century, upon a new view of the effect of conditions which then existed.

Again, it is insisted that the resolutions are in conflict with the provisions of the Railroad Act, P. L. 1903, p. 656. The statutory provisions alluded to are Sec. 19, which provides that where a terminus of a railroad is on the shore of any river or navigable water of this State, the railroad company may establish and operate ferries, or lease or maintain ferries for the transportation of persons and property on or across such navigable waters; and Sec. 38, which permits a railroad company to charge for transportation reasonable rates for passengers, not exceeding three and three and a half (3
111 and 3½) cents per mile; and Sec. 43 fixing the maximum rate for freight.

The operation of this act, by its language as well as by its title, seems to be restricted to traffic upon a railroad and upon a ferry

which is made by the terms of the act, a part of such railroad. When a ferry is an appendage of a railroad, under the provisions of this act, the right to fix reasonable rates for a railroad trip over its route, including the ferry, seems to be put exclusively in the hands of the railroad company. But a charge for a ferry trip, to be taken by a person other than a railroad passenger over a technical ferry existing as a distinct corporation, is not within the terms of the act, although the same ferry may be used for transportation of railroad passengers and freight.

Nor, in my judgment, do the resolutions attempt to include a fixing of fares to be charged by a railroad company for passage of its passengers over a portion of its road which may be over navigable waters. The resolution recites that "it appearing to the board that the rates to be taken at the several ferries specifically mentioned within the county of Hudson for the transportation and carriage of all foot passengers from the county of Hudson, shall be"—fixing the rates. Then follows the, "Be it resolved, that this board fix the rate of ferriage to be charged by the aforesaid companies for the transportation of foot passengers from the county of Hudson, at the sums already mentioned in the opinion."

This language seems to indicate that the Board of Chosen Freeholders was dealing with charges to be made at the ferry in Hudson County for the transportation over ferries considered alone as technical ferries; and that they did not intend to deal with fares
112 paid to a railroad company using the ferries as a part of its road under the statute of 1903.

Again it is insisted, that the rates fixed by the Board of Chosen Freeholders was an exercise of a power of confiscation and not regulation. It does not appear in any finding of fact by the Supreme Court, or any indisputable fact in the testimony, that the rates fixed by the board were confiscatory; and so the record presents no legal question for this court.

The judgment below must be reversed.

Endorsed: "Filed Jun- 14, 1909. S. D. Dickinson, Clerk."

State of New Jersey, Department of State.

Comparing and Certifying Division.

Copy correct.
Compared by J. L. Hendricks.
Original Read by Pycraft.

J. L. HENDRICKS,
In Charge of Division.

113 State of New Jersey, Department of State.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true

copy of an opinion read by said Court in the above-stated cause, at the March Term, 1909, as the same, is taken from and compared with the original now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Sixteenth day of June, A. D. 1909.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON,
Secretary of State.

114 [Endorsed:] New Jersey Court of Errors and Appeals. March Term, 1909. Between New York Central & Hudson River R. R. Pros. & Defts. in Error, v. The Board of Chosen Freeholders of the County of Hudson, Defts. & Pltffs. in Error. Opinion.

115 New Jersey Court of Errors and Appeals, June Term, 1908.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

GUMMERE, *C. J.*, dissenting:

The controversy in this case respects the power of the Board of Freeholders of Hudson County to fix the rates of ferriage to be charged by the various companies operating ferries across the Hudson River, from points on the Hudson County shore to the City of New York. Legislative authority to fix such rates has been conferred upon the Board, and the validity of such legislation has been affirmed by this Court in the case of State vs. Freeholders of Hudson, 4 Zab. 718. The fundamental question which the case presents for decision, as is stated in the majority opinion, is, "Whether the Federal Supreme Court has definitely decided that the doctrine laid down in State vs. Freeholders of Hudson is erroneous;" for, if that doctrine has not been so declared, then the maxim of stare decisis should control, and we should follow our earlier decision.

The doctrine laid down in the 4 Zabriskie case and upon which the decision of that case was rested, is thus expressed by Mr. Justice Elmer, who delivered the opinion. After reciting that it was insisted that the ferry in question was a part of the means of carrying on commerce between two states of the Union, and that a regulation of the rates of fare for the carrying of passengers and goods was, in effect, a regulation of commerce, which, it was argued, belongs
116 exclusively to Congress, he proceeded as follows: "Whether the power of regulating commerce between the states is to be considered as vested exclusively in Congress, so that the legislatures of the several states cannot constitutionally pass any law on the subject, although it may not conflict with any existing treaty or law of the United States, has not yet been authoritively settled by the Supreme Court of the United States. But conceding it to be so, the

regulation of the tolls of bridges and turnpike roads, and the fares of railroads and ferries is in no just sense a regulation of commerce, and has never been so regarded. It is a part of that general power of police essential to every state, and which could not be with safety, and has not been, surrendered to the general government. That the State may regulate the tolls and fares of turnpikes and railroads and ferries fully within its jurisdiction, counsel have not gone so far as to deny. But such regulations will in many cases affect the commerce among the several states as much as the regulation of tolls at a ferry directly between two states. If the states, separately or jointly, cannot regulate a ferry between two of them, neither can they authorize the building of a bridge or prescribe the tolls for passing it. These and the like powers have been exercised by most of the states of the Union without doubt or hesitation from the adoption of the Constitution to the present day, and are, in my opinion, in no wise repugnant to the provisions of that instrument."

At the time of the promulgation of this decision (March Term, 1853) and later, the comprehensive scope of the commerce clause of the Federal Constitution was unappreciated by Federal as well as State tribunals. In 1861 the Federal Supreme Court, in the case of Conway vs. Taylor, 1 Black, 603, expressly affirmed the doctrine of our decision in 4 Zabriskie saying "There has been now
117 nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass of undelegated powers' which 'are reserved to the States respectively' we think too clear to admit of doubt." As late as the October Term, 1881, of that Court the same view was expressed in the case of Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365. About this time, however, the far-reaching importance of national control over interstate as well as over foreign commerce began to be generally understood; and nowhere more completely than in the Federal tribunals. Just two years after the decision in the Wiggins Ferry Co. case the Federal Supreme Court had before it the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, which involved the right of the State of Pennsylvania to impose a tax upon the capital stock of a New Jersey ferry company operating an interstate ferry across the Delaware River between the City of Camden in the State of New Jersey, and the City of Philadelphia in the State of Pennsylvania. The conclusion reached by the Court was that Pennsylvania had no such power. The ground of its decision is shown by the following extract from the syllabus of the opinion. "When the subjects of commerce are national in their character and require uniformity of regulation, affecting alike all of the States, the power of Congress is exclusive. The commerce between the States which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regu-

lation. Congress alone can deal with such transportation, and
118 its non-action is a declaration that it shall remain free from burdens imposed by state legislation. A ferry is a means—and a necessary means—of commercial intercourse between states bordering on dividing waters, and it must, therefore be conducted without the imposition by the States of taxes or other burdens upon the commerce between them."

Whatever may have been said in this case which is obiter, it certainly lays down at least two principles which are fundamental to its decision: first, that an interstate ferry is a means of commercial intercourse between the States—a means for transportation of persons and property between them; second, that the regulation thereof is a subject of national character.

It is considered in the majority opinion that the declaration of the Federal Court in this case "did not antagonize any fundamental position upon which the decision in the case of State vs. Freeholders of Hudson was grounded;" that "the conclusions reached by Judge Elmer were not reached by denying that the business of ferrying was interstate commerce, but by denying that the regulation of the tolls to be charged by a keeper of a ferry residing in this State was inimical to the power of Congress to regulate commerce." This assertion can only be justified upon the theory that the regulation of tolls to be charged for the transportation of persons and property between the states is not a regulation of such transportation; a theory which has been entirely exploded by the decision of the United States Supreme Court in the Covington Bridge case, to which I shall presently refer more fully. A comparison of what is said in the two opinions makes this apparent. Judge Elmer declares that "the regulation of tolls on ferries which are used for communication and commerce between the states is a part of the general power of police
119 essential to every state, and which could not be with safety, and has not been, surrendered to the general government."

If this means anything, it means that such regulation is not a regulation of commerce between the states. The Supreme Court of the United States declared in the Gloucester Ferry Co. case that the power to regulate the transportation of persons and property between the states is a subject of national character; and that Congress alone can deal with such transportation.

But assuming that the principle underlying the decision in the Gloucester Ferry Co. case is not necessarily antagonistic to that upon which Judge Elmer rested his decision in the 4 Zab. case, the same cannot be said of the decision in the later case of Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S. 104, decided nine years after. That case involved the question of the right of the State of Kentucky to regulate the tolls to be charged for the transportation of persons and of property over a bridge spanning the Ohio River between the states of Kentucky and Ohio. The Court declared (I quote from the syllabus of the opinion) that traffic across the Ohio River between these two states was interstate commerce; that the bridge which spanned the river was an instrument of such commerce; that a statute of the State of Kentucky which prescribed the

tolls which should be charged for passage over the bridge was an attempted regulation of commerce which the State had no constitutional power to make; and that the authority of the State was limited to fixing tolls on such channels of commerce as were exclusively within its territory. It is true, as is stated in the majority opinion in this case, that this decision was by a bare majority of the members of the Court; but the view expressed therein is as binding on us as if it had received the fullest approval of every judge who took part in its decision. The principle established by it is that the regulation of the tolls to be charged for the transportation of persons
120 and property over "an instrument of interstate commerce" is a regulation of interstate commerce; and that such a regulation a single state has no power to make. The principle upon which the 4 Zab. case is rested is that "the regulation of fares on ferries which are used for communication between the states is a part of the powers reserved to the state, and is not delegated to the general government." It seems to me too plain for discussion that the principle upon which the Covington Bridge Co. case rests is absolutely destructive of that laid down by Judge Elmer in the 4 Zab. case. But my brethren of the majority say that the Federal Court in the case last cited from its decisions, was dealing with a bridge, and not with a ferry, and therefore, it cannot be certain that by their decision they overruled the principle laid down by Judge Elmer that the power to regulate fares on interstate ferries was a power not delegated to Congress, but reserved to the states. The Supreme Court of the United States declared, in the Gloucester Ferry Co. case, that an interstate ferry was an instrument for executing interstate commerce, and this declaration was not obiter, but was the underlying principle upon which the decision was rested. In the Covington Bridge Co. case it declared that an interstate bridge was, likewise, an instrument of interstate commerce; and in the latter case it further declared that a regulation of tolls to be charged for the transportation of persons and property over an instrument of interstate commerce, was a regulation of commerce which it was beyond the power of a single state to make. If these two cases, taken together, do not absolutely overrule the principle upon which our decision in the 4 Zab. case rests, then I am at a loss to perceive how that result can be accomplished by the Federal tribunal, except by having before it the question of the power of the State of New Jersey to regulate
121 the rate of ferriage to be charged upon a ferry crossing the Hudson River between that state and the State of New York.

It is suggested that the opinion of the United States Supreme Court in the case of St. Clair County vs. Interstate Transfer Co., 192 U. S. 154 (decided at October Term, 1903) indicates that the Federal Court is prepared to depart, to some extent, from the view expressed by it in the Gloucester Ferry Co. and Covington Bridge Co. cases. I find no such indication in the opinion, but, if I did, I should not consider that it afforded any justification for a refusal by a state court to follow those decisions. Unless an intimation by a court of doubt as to the soundness of a legal principle which has been established by it in an earlier decision is to be given the same force

and effect as an express repudiation by it of that doctrine and the promulgation of the opposite one, the principle declared by the Gloucester Ferry Co. case and the Covington Bridge case is law, until it is repudiated by the tribunal which established it.

For the reasons which I have given I am compelled to dissent from the conclusion expressed in the majority opinion, viz., "that the decision of this Court in the case of State vs. Chosen Freeholders of Hudson County, which case controls the present, has not been overruled by the Supreme Court of the United States in any decision which makes the present case res adjudicata in that court."

The conclusion reached by the majority of this Court as to the controlling effect of State vs. Chosen Freeholders makes a consideration of the scope of the interstate commerce act, and its supplement, generally known as the Hepburn Act, bootless. For, if the regulation of the tolls upon ferries which are used for communica-
122 tion and commerce between states is part of the powers reserved to the states and is not delegated to the general government," clearly the legislation adverted to, so far as it attempts to regulate tolls upon interstate ferries (if it has that scope), must be abortive an unwarranted and unconstitutional infringement upon the rights and powers of this state.

I am authorized to say that Justices Parker, Bergen and Voorhees, and Judge Gray, concur in the views which I have expressed.

Endorsed: "Filed Dec. 15, 1909. S. D. Dickinson, Clerk."

State of New Jersey, Department of State.

Comparing and Certifying Division.

Copy correct.
Compared by Struble.
Original read by Fisher.

J. L. HENDRICKS,
In Charge of Division.

123 STATE OF NEW JERSEY,
Department of State:

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of an opinion read by said Court in the above-stated cause, November Term, 1909, as the same is taken from and compared with the original now remaining on file in my office.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Seventeenth day of December, A. D. 1909.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON,
Secretary of State.

124 [Endorsed:] New Jersey Court of Errors and Appeals. November Term, 1909. Between New York Central & Hudson River Railroad Company vs. The Board of Chosen Freeholders of the County of Hudson. Opinion.

125 New Jersey Court of Errors and Appeals, June Term, 1908.

Between

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,
Plaintiff in Error.

In Error to Supreme Court.

Order on Reversal of Judgment.

This cause having been duly argued at the June Term, 1908, of this court by John Griffin, of counsel for the plaintiff in error, and Vredenburgh, Wall & Carey, of counsel for the defendant in error, and the court having inspected the record and judgment below, and considered the causes assigned for error.

It is thereupon, on this fourteenth day of June in the year of our Lord one thousand nine hundred and nine ordered that the judgment of the said Supreme Court be in all things reversed, set aside and for nothing holden; with the costs of the plaintiff in error in this court and the Supreme Court to be taxed, and that the record and proceedings be remitted to the said Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

JOHN GRIFFIN,
Attorney of Plaintiff in Error.

Docketed.

126 Department of State.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the Last Resort in all Causes, do hereby certify, that the foregoing is a true copy of an order made by said Court in the above stated cause, dated June 14th, 1909, as the same is taken from and compared with the Minutes of said Court.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this sixth day of July, A. D. 1909.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON,
Secretary of State.

[Endorsed:] New Jersey Court of Errors and Appeals. June Term, 1909. New York Central and Hudson River Railroad Company, Defendant in Error, vs. The Board of Chosen Freeholders of the County of Hudson, Plaintiff in Error. In Error to Supreme Court. Order on Reversal of Judgment. John Griffin, Att'y. Filed Jun. 16, 1909. S. D. Dickinson, Clerk.

127 New Jersey Supreme Court. November Term, 1909.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,
Defendant.

On Certiorari.

Rule for Judgement.

It appearing that the record and proceedings in this cause have been remitted by the New Jersey Court of Errors and Appeals to this court to be proceeded with in accordance with the judgment of said New Jersey Court of Errors and Appeals, reversing the judgment of this Court;

It is thereupon, on this third day of December, in the year of our Lord, one thousand nine hundred and nine, ordered, that the judgment of this Court heretofore entered herein, be in all things reversed, set aside and for nothing holden, and that the resolutions of the Board of Chosen Freeholders of the County of Hudson, brought up by said writ, be in all things affirmed; with the costs of the Board of Chosen Freeholders of the County of Hudson, plaintiff in error, in said New Jersey Court of Errors and Appeals, and the Supreme Court, to be taxed.

Done in open Court.
Entered December 3, 1909.
On motion of

JOHN GRIFFIN,
Defendant's Attorney.

128 I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this sixth day of May, A. D. nineteen hundred and ten.

[Seal of the Supreme Court.]

WM. RIKER, JR., *Clerk.*

129 [Endorsed:] New Jersey Supreme Court. New York Central and Hudson River Railroad Company, Plaintiff, vs. The

Board of Chosen Freeholders of the County of Hudson, Defendant. On Certiorari. Copy of Rule. John Griffin, Attorney. Clerk's Office, Trenton.

130 Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant in Error.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the United States:

Comes now your petitioner, The New York Central & Hudson River Railroad Company, Plaintiff in Error, by its attorneys, and as and by way of complaint of and against said The Board of Chosen Freeholders of the County of Hudson, Defendant in Error, respectfully shows to this Court:

That the West Shore Railroad Company is a body corporate, organized and existing under the laws of the State of New York, and is domiciled in said State of New York.

That said Railroad Company is the owner of a line of interstate railroad, extending from Buffalo, New York, by way of Albany, New York, and Weehawken, New Jersey, to the City of New York in the State of New York, together with various connecting lines.

That, as constituting a part of the railroad system of said West Shore Railroad Company, said Railroad Company owns two ferries, one of which is known as the West Shore Railroad Ferry, and the other is known as the West Shore Ferry. The westerly terminus of the West Shore Railroad Ferry is at Weehawken, in the
131 State of New Jersey, and the easterly termini thereof are at Franklin Street and at Forty-second Street, both in the City and State of New York. That the westerly terminus of the West Shore Ferry is at West New York, New Jersey, and the easterly terminus is at Forty-second Street in the City and State of New York.

That for many years prior to the year nineteen hundred and five, The New York Central & Hudson River Railroad Company was, and now is, the lessee of said West Shore Railroad Company and, as such lessee, during all said time has been and now is in possession of all the railroad property, railroad lines and appurtenances of said West Shore Railroad Company, including said ferries, and during all said time has been and now is engaged in operating said railroad and said ferries, and while so doing was and is engaged, as a common carrier, in carrying on interstate commerce. That, in the operation of said ferries, your petitioner makes use of ferry-boats for transportation purposes, which ply between said railroad terminal at Weehawken, New Jersey, and between West New York, New Jersey, and said ferry termini in the City and State of New

York. That the primary purpose of said ferries and the operation thereof, is the accommodation of the patrons of said railroad, and the general passenger, mail, express, baggage and freight service thereof. That said ferry-boats are also accessible to and are availed of for the transportation of persons and property other than travelers upon, and shipments by, said railroad. That of the persons and property other than travelers upon and shipments by said railroad, a part are in transit from points within, and a part are in
132 transit from points without, the County of Hudson. That the transportation provided by said petitioner by means of said ferries and the boats operated in connection therewith, is across the Hudson River, the same being public navigable waters of the United States, and forming the boundary between the States of New Jersey and New York.

That on the sixth day of February, 1799, the Legislature of the State of New Jersey passed an act entitled, "An Act concerning Ferries," which act, among other things, contains the following provisions:

"That the Board of Chosen Freeholders shall be and they hereby are empowered and directed to fix the rates to be taken by the several ferries within their respective counties, and the same, from time to time, to revise, alter, amend, or make anew, at their discretion."

That the said Act is found on pages 1469 and 1471 of the General Statutes of New Jersey, and the same in its entirety is by reference made a part hereof.

That, by resolution passed July 6th, 1905, said Board of Chosen Freeholders of the County of Hudson did purport and attempt to fix the rates of ferriage to be charged by your petitioner for the transportation by said ferries, of foot-passengers from the County of Hudson, New Jersey, to the termini of said ferries in the State of New York, and from said termini, returning to the County of Hudson, New Jersey, at the rate of six cents for each adult person, for the round trip, and four cents for each person under ten years of age.

That, by further resolution passed on said 6th day of July, 1905, said Board of Chosen Freeholders of the County of Hudson did purport and attempt to fix the rates of ferriage to be charged by your petitioner for the transportation of foot-passengers from said County of Hudson by said ferries, to the termini of the several ferries
133 in the State of New York, at the rate of three cents for each adult person and two cents for each person under ten years of age.

That, by writ of certiorari issuing out of the Supreme Court of the State of New Jersey, your petitioner caused said resolution of said Board of Chosen Freeholders of the County of Hudson to be certified to said Supreme Court, for the purpose of having the legality and binding effect thereof upon your petitioner determined by said Court. That, by the judgment of said Court, entered in said cause on the 6th day of May, 1907, it was adjudged that said resolutions

were illegal and void, and that the same should be and they thereby were set aside and for nothing holden.

That thereafter said Board of Chosen Freeholders of the County of Hudson sued out a writ of error from the Court of Errors and Appeals of the State of New Jersey, directed to the Justices of the Supreme Court of the State of New Jersey, whereby said record and proceedings and the judgment entered therein were removed to the said Court of Errors and Appeals for review, and said Court, by its final judgment entered therein on the 16th day of June, 1909, reversed said judgment of the Supreme Court of the State of New Jersey, and did remit said record and proceedings to said Supreme Court, there to be proceeded with in accordance with said judgment of the said Court of Errors and Appeals, and the practice of said Supreme Court; and thereupon and on the third day of December, 1909, said Supreme Court, in conformity with said judgment of said Court of Errors and Appeals, did in all things affirm said resolutions and did adjudge said resolutions to be valid and effective.

134 That said Court of Errors and Appeals is the highest Court of said State in which a decision in said action can be had, and that the judgment of said Court of Errors and Appeals, together with said record and proceedings, and the judgment of the Supreme Court entered in pursuance of, and in conformity with, said judgment of said Court of Errors and Appeals, is now in said Supreme Court of said State of New Jersey, which Court is the custodian thereof.

That in said action in the New Jersey Supreme Court, and in the Court of Errors and Appeals of the State of New Jersey, there was drawn in question the validity of the aforesaid statute of the State of New Jersey, as so applied to your petitioner, and the validity of the authority exercised under said State by said Board of Chosen Freeholders and the validity of said resolutions passed by said Board pursuant to the provisions of said statute, on the contention of your petitioner that said statute and resolutions, and the authority so exercised by said Board of Chosen Freeholders of the County of Hudson, were and are repugnant to the Constitution and Statute Laws of the United States, in the following particulars, to wit:

1. That said statute and resolutions and the authority exercised under said State by said Board of Chosen Freeholders pursuant to the provisions of said statute, impair the obligations of the contract arising upon the grant, acceptance and exercise of the charter powers conferred upon the owner of said ferries, of which powers your petitioner, as such lessee, was and is possessed and is entitled to exercise, and thereby they violate Article I, Section 10 of the Constitution of the United States.

135 2. That said statute and resolutions, and the authority so exercised by said Board of Chosen Freeholders, deprive your petitioner of its property without compensation and without due process of law, and thereby violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. That the attempted regulation of the rates for ferriage to be charged on said ferries by your petitioner, under and pursuant to

the provisions of said statute, and the exercise of the authority purported to be granted thereby, is in violation of the Commerce Clause of Section 8 of Article I of the Constitution of the United States, in that it constitutes an illegal interference with, and an attempted regulation of, interstate commerce.

4. That there are many other ferries in the County of Hudson, similarly situated to the ferries of your petitioner, which other ferries are not affected by, and were not intended by said Board to be affected by, said resolutions, or by any other resolution of said Board fixing rates of ferriage thereon. That the said resolutions and authority so attempted to be exercised by said Board of Chosen Freeholders, whereby said Board selected out of the many ferries in Hudson County similarly situated, the ferries operated by your petitioner, and fixed the rates of ferriage to be charged by it, leaving the rates to be charged by other similar ferries uncontrolled and unrestrained by said resolutions, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deny to your petitioner, a person within the jurisdiction of the State of New Jersey, the equal protection of the laws.

136 5. Because said resolutions and the authority attempted to be exercised by said Board of Chosen Freeholders under said State of New Jersey, pursuant to the provisions of said statute, are contrary to and in violation of the Constitution of the United States and of the statute of the United States entitled, "An Act to Regulate Commerce," approved February 4, 1887, and the supplements thereto.

6. Because said statute, as so applied to the ferries of your petitioner, and said resolutions and the authority so attempted to be exercised by said Board of Chosen Freeholders, violate the Commerce Clause of Section 8 of Article I of the Constitution of the United States, in that thereby it is attempted to regulate and control interstate commerce, which the Federal Government alone has the right to regulate and control.

7. That said ferries constitute a portion of a post route of the United States; that the boats employed thereon carry the United States mail and property belonging to the Federal Government, between the States of New Jersey and New York, over the public navigable waters of the United States, for the navigation of which they are licensed under and pursuant to United States Statutes. That the power to regulate and control such operations is vested solely in the Federal Government, and the said resolutions and authority sought to be exercised, violate the Commerce Clause of Section 8 of Article I of the Constitution of the United States, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

That in and by the judgment of said Court of Errors and Appeals, and the judgment of the Supreme Court, entered in con-

137 formity therewith and in pursuance thereof, the validity of said statute as so applied to your petitioner, and the validity of said resolutions and of the authority attempted to be exercised under said State, pursuant to said statute, was affirmed.

That by the law of the State of New Jersey regulating the review by the Court of Errors and Appeals of said State, of judgments and decrees of inferior courts, the opinion pronounced by the inferior Courts upon their final determination of the action, is embodied in the record reviewed by said Court of Errors and Appeals. That in the opinion delivered by said Supreme Court in this action, it affirmatively appears from the language used by said Court, that the validity of said statute, and the validity of said resolutions and of the authority attempted to be exercised under said State pursuant to said statute, were drawn in question and litigated in said action; said Court, in the course of said opinion, used the following language:

"Since, however, the question raised in the present case involves the power of the State under the Federal Constitution, our Court of Errors and Appeals is not the Court of last resort. For an authoritative decision we must look to the Supreme Court of the United States."

In said opinion said Supreme Court used the following language:

"The proof in this case shows that the ferry in question is operated by the New York Central & Hudson River Railroad, in connection with its railroad, for the transportation of passengers between New York City and points in New Jersey, New York and elsewhere, and that in accordance with the Act of Congress, the schedule of rates charged on the ferry has been filed with the Interstate Commerce Commission. The Act of Congress is applicable, and since Congress has undertaken thereby to regulate the charges for transportation, any right which the State of New Jersey might have conferred originally upon the Board of Freeholders, must yield to the paramount authority of Congress over interstate commerce."

138 That, by the opinion delivered in said Court of Errors and Appeals, it likewise affirmatively appears that the validity of said statute and of said resolutions and of the authority attempted to be exercised under said State pursuant thereto, was drawn in question and litigated in said Court. Said Court, in said opinion, uses the following language:

"The prosecutors and Defendants in Error—New York Central & Hudson River R. R. Company—are the lessees and operators of the ferries between Weehawken in Hudson County, New Jersey, and Franklin Street, New York City; and between West New York, New Jersey, and Forty-second Street, New York City.

"The Supreme Court held that the above resolutions were invalid upon the ground that the regulation of the rates of ferriage for any passengers across the Hudson River from New Jersey to New York, is a regulation of interstate commerce, over which the power of Congress is paramount.

"The question whether, under the Federal Constitution, the State of New Jersey was excluded from the regulation of tolls to be charged by the ferry companies having one of their termini in the State of New Jersey, is thus presented upon this writ of error to this Court.

"The argument divides itself broadly into two questions: Whether the legality of the resolutions, so far as respects the judgments of the courts of this State, has been definitely settled; and, second, whether, if the question is stare decisis in this Court, a different doctrine has been pronounced and settled by the Supreme Court of the United States."

In said opinion, said Court of Errors and Appeals uses the following language:

"It is again insisted that the regulation by the State of New Jersey is excluded, because Congress has legislated concerning ferries operated in connection with railroads. The congressional legislation thus alluded to is said to be contained in the Interstate Commerce Act of 1887, and the amendments thereto."

In said opinion said Court of Errors and Appeals uses the following language:

"Again, it is insisted that the rates fixed by the Board of Chosen Freeholders was an exercise of a power of confiscation, and not regulation."

139 That, notwithstanding the contention of your petitioner against the validity of said statute as so applied to it, and against the validity of said resolutions and of the authority attempted to be exercised under said State of New Jersey pursuant to the provisions of said statute, both in said Supreme Court and in said Court of Errors and Appeals, the decision of said Court of Errors and Appeals was adverse to the contention of your petitioner, and in favor of the validity of said statute as applicable to your petitioner, and in favor of the validity of said resolutions and of the authority attempted to be exercised thereunder and under said State; all whereof appears in and by the record of the proceedings and the judgment of said Court of Errors and Appeals, and the judgment entered in said Supreme Court, upon the record remitted from said Court of Errors and Appeals, in pursuance of and in conformity with the judgment of said Court of Errors and Appeals.

Wherefore, said Plaintiff in Error, the petitioner herein, prays the allowance of a writ of error, directed to the Supreme Court of the State of New Jersey, the possessor and custodian of the record of the proceedings and judgments in this action, commanding that the said record and proceedings in said action be sent by said Supreme Court to the Supreme Court of the United States, with all things concerning the same, and for citation and supersedeas to stay said Board of Chosen Freeholders from enforcing said judgment, and to stay execution and proceedings upon said judgment, in order and to the end that the errors complained of in the assignment of errors herewith filed by said petitioner may be re-

140 viewed, and if error be found, that the same may be corrected conformably to the Constitution and laws of the United States.

VREDENBURGH, WALL & CAREY,
Attorneys of Petitioner and Plaintiff in Error.
1 *Exchange Place, Jersey City, N. J.*

JAMES B. VREDENBURGH,
Of Counsel.

141 [Endorsed:] Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Pl't'ff in Error, vs. The Board of Chosen Freeholders of the County of Hudson, Def't in Error. Petition for Writ of Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

142 Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY, Defendant in Error.

On Writ of Error.

Assignment of Error.

To the Honorable Justices of the Supreme Court of the United States:

Comes now The New York Central & Hudson River Railroad Company, Plaintiff in Error, and respectfully shows to the Court that there is in the said record and proceedings manifest error prejudicial to the said plaintiff in error, the prosecutor in the New Jersey Supreme Court and the defendant in error in the Court of Errors and Appeals of the State of New Jersey, upon which it will rely upon its prosecution of the writ of error in the above entitled cause, to wit:

There is manifest error in said record and proceedings,

A. Because, by the judgment of the Court of Errors and Appeals of the State of New Jersey, and by the judgment entered in the Supreme Court in conformity therewith, and in pursuance thereof, the former judgment of said Supreme Court, brought by writ of error in said Court of Errors and Appeals, is in all things reversed and for nothing holden; whereas, said judgment should have been in all things affirmed.

143 B. Because said judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment of the Supreme Court of said State, entered in pursuance thereof and in conformity therewith, are in favor of the validity of the resolution of the Board of Chosen Freeholders of the County of Hudson, brought up by the writ of certiorari in said record contained, and in favor of the validity of the statute of said State, entitled, "An Act concerning Ferries," passed February 6th, 1799 (General Statutes of New Jersey, pages 1469 to 1471), and in favor of the validity of the authority attempted to be exercised by said Board of Chosen Freeholders, under said State of New Jersey, pursuant to the provisions of said statute as administered and applied to the plaintiff in error, for the purpose of regulating and fixing the rates of ferriage to be charged by it upon the ferries operated by it and mentioned

and described in said record; whereas, in said cause, judgment should have been against the validity of said resolutions and the statute and authority as so administered and applied to the plaintiff in error.

C. Because in and by said record and judgment it is adjudged that the resolutions of the Board of Chosen Freeholders of the County of Hudson, brought up by the writ of certiorari in said record contained, should be in all things affirmed, notwithstanding said resolutions and the aforesaid statute of said State, pursuant to and by authority of which said resolutions were adopted, and the administration of said statute and the authority attempted to be exercised by said Board of Chosen Freeholders, under said State of New Jersey, pursuant to the provisions of said statute, as applied to the plaintiff in error for the purpose of regulating and
144 fixing the rates of ferriage to be charged by it upon said ferries mentioned and described in said record, violate the Constitution and Laws of the United States in the manner and in the particulars following, to wit:

1. That they violate Section 10 of Article I of the Constitution of the United States, by impairing the obligations of the contract arising upon the grant, acceptance and exercise of the charter powers conferred upon the owner of said ferries, of which powers the plaintiff in error, as lessee, was and is possessed, and was and is entitled to exercise.

2. That they violate Section 1 of the 14th amendment to the Constitution of the United States, by depriving the plaintiff in error of its property without compensation and without due process of law.

3. That they violate the Commerce Clause of Section 8 of Article I of the Constitution of the United States, by attempting to regulate and control interstate commerce.

4. That they violate Section 1 of the 14th amendment to the Constitution of the United States, by denying to the plaintiff in error the equal protection of the laws.

5. That they violate the Statute of the United States entitled, "An Act to regulate Commerce," approved February 4th, 1887, and the supplements thereto, by attempting to regulate interstate commerce carried on by means of the ferries operated by the plaintiff in error, although such commerce is now regulated by the statute aforesaid.

6. That they violate Section 8 of Article I of the Con-
145 stitution of the United States, and the 14th Amendment to the Constitution of the United States:

(*a*) By attempting to regulate interstate commerce upon and over the public navigable waters of the United States.

(*b*) By attempting to regulate interstate commerce over a post-route of the United States, or over a portion thereof.

(*c*) By attempting to regulate commerce carried on by means of boats carrying property of the United States Government over the public navigable waters of the United States.

(*d*) By attempting to regulate commerce carried on by means of boats enrolled and licensed for the coasting trade under United

States statutes, and which navigate the public navigable waters of the Hudson River under authority of such enrol-ment and license.

And the plaintiff in error prays that the judgments aforesaid may be reversed, annulled and for nothing holden, and that the resolutions of the Board of Chosen Freeholders of the County of Hudson, in said record and proceedings set forth, may be adjudged to be illegal and void, and that the same may be set aside and for nothing holden.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

146 Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY,
Defendant in Error.

On Writ of Error.

Service of Copy of Writ of Error and Copy of Assignments of Error is hereby acknowledged this 26th day of April, 1910.

JOHN GRIFFIN,
Attorney of Defendant.

147 [Endorsed:] Original. Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Pltff. in Error, vs. The Board of Chosen Freeholders of Hudson County, Deft. in Error. On Writ of Error. Assignment of Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

148 Know all men by these presents, That the undersigned, the New York Central & Hudson River Railroad Company, a corporation organized under the laws of the State of New York, as principal, and the National Surety Company, a corporation authorized to do business in the State of New Jersey, as surety, are held and firmly bound unto the Board of Chosen Freeholders of the County of Hudson in the just and full sum of Five Hundred Dollars, to be paid to the said Board of Chosen Freeholders of the County of Hudson, its certain attorneys, successors or assigns; to which payment well and truly to be made, said corporations bind themselves, their successors, representatives and assigns, jointly and severally, firmly by these presents.

Sealed with the seals of said corporations and dated this sixth day of January, nineteen hundred and ten.

Whereas, lately, in the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, in a suit pending in said Court between said The New York Central & Hudson River

Railroad Company, defendant in error, and said the Board of Chosen Freeholders of the County of Hudson, plaintiff in error, judgment was entered against said The New York Central & Hudson River Railroad Company and in favor of said the Board of Chosen Freeholders of the County of Hudson; and the record and proceedings in said action were thereupon remitted to the Supreme Court of the State of New Jersey, and thereupon judgment was entered in said Supreme Court in favor of said the Board of Chosen Freeholders of the County of Hudson and against said The New York Central & Hudson River Railroad Company; and said The New York Central & Hudson River Railroad Company being about to apply for a writ of error to reverse the judgment in said suit, and for the issuing of a citation directed to said the Board of Chosen Freeholders of the County of Hudson, citing and admonish-
149 ing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia:

Now therefore, the condition of the above obligation is such that if said The New York Central & Hudson River Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[Corporate Seal of N. Y. C. & H. R. R. R. Co.]

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
By W. C. BROWN, *President.*

[Corporate Seal of National Surety Co.]

NATIONAL SURETY COMPANY,
By GEORGE G. TENNANT,
Asst. Vice Prest.
ERNEST E. SMITH,
Asst. Asst. Secty.

Attest:

D. W. PARDEE,
Secretary.

The foregoing bond is satisfactory as to form, amount, and the sufficiency of the surety thereon.

JOHN GRIFFIN,
Attorney for the Board of Chosen Freeholders of the County of Hudson.

Approved April 9th, 1910.

OLIVER WENDELL HOLMES,
Associate Justice Supreme Court U. S.

150 STATE OF NEW JERSEY,
County of Hudson, City of Jersey City, ss:

On this, 6th day of January, 1910, before me, the subscriber, a Notary Public for the State of New Jersey, duly commissioned and sworn, personally came Ernest E. Smith, who, being by me duly sworn, on his oath, saith: That he is the Resident Assistant Secretary of the National Surety Company of the State of New York, and that he resides in the City of Jersey City, that he knows George G. Tennant, Resident Vice-President of the National Surety Company, and he knows, too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and that it was affixed by the said Resident Vice-President and the said instrument signed by the said Resident Vice-President as Resident Vice-President of said Company, attested by deponent as Resident Assistant Secretary, by order of the Board of Directors of said Company, in deponent's presence, as the voluntary act and deed of said Company; that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902 and the amendments thereof and supplements thereto; that the good available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the National Surety Company is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; that it has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars ($200,000) held as security for all holders of its obligations and has a fully paid up, safely invested and unimpaired capital of Seven Hundred and Fifty Thousand Dollars ($750,000); and said Company has appointed the Commissioner of Banking and Insurance of New Jersey and his successor in office as its true and lawful Attorney in the State of New Jersey, upon whom process of law can be served, and has filed in the office of the Commissioner of Banking and Insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such Attorney, within the State of New Jersey; and that the following is a true copy of a By-law duly adopted by the Board of Directors of the said National Surety Company on the fourth day of February, 1908, at a regular meeting, to wit:

"Article XIII. SEC. 1. Signatures Required.—All bonds, recog-"nizances, or contracts of indemnity, policies of insurance, and all "other writings obligatory in the nature thereof, shall be signed by "the President, a Vice-President, a Resident Vice-President or At-"torney-in-Fact, and except when signed by an Attorney-in-Fact "shall have the seal of the Company affixed thereto, duly attested by "the Secretary, an Assistant Secretary or Resident Assistant Secre-"tary. All Vice-Presidents and Resident Vice-Presidents shall each "have authority to sign such instruments, whether the President be "absent or incapacitated or not; and the Assistant Secretaries and

"Resident Assistant Secretaries shall each have authority to seal and "attest such instruments, whether the Secretary be absent, or inca- "pacitated or not. All such instruments executed as herein provided "shall be as binding upon the Company as if the same were signed "by the President and duly sealed and attested by the Secretary."

ERNEST E. SMITH,
Resident Assistant Secretary.

Sworn and subscribed in the City of Jersey City, in the County of Hudson and State of New Jersey, this 6th day of January, A. D. 1910, before me, a Notary Public, for the State of New Jersey, duly commissioned and sworn.

[SEAL.] HEDWIG FINKE,
Notary Public of New Jersey.

151 I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Bond filed in above stated cause, as required by the statute for the removal of said cause to the United States Supreme Court, as the — remains on file in my office.

In Testimony Whereof I have hereunto set my hand and the seal of said Court at Trenton, this seventh day of May, A. D. nineteen hundred and ten.

[Seal of the Supreme Court.]

WM. RIKER, JR., *Clerk.*

152 UNITED STATES OF AMERICA, *ss:*

To the Board of Chosen Freeholders of the County of Hudson, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Office of the Clerk of the Supreme Court of the State of New Jersey, wherein The New York Central & Hudson River Railroad Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this 9th day of April, in the year of our Lord One Thousand Nine Hundred and ten.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

153 [Endorsed:] Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Plt'ff in Error, vs. The Board of Chosen Freeholders of the County

of Hudson, Def't in Error. On Writ of Error. Citation. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

Due and timely service of within citation acknowledged, this 26 day of April, 1910.

JOHN GRIFFIN,
Attorney of Defendant in Error.

154 [Endorsed:] Supreme Court of the United States. The New York Central & Hudson River Railroad Company, Plaintiff in Error, vs. Board of Chosen Freeholders of the County of Hudson, Defendant in Error. Return to United States Supreme Court. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J.

155 Supreme Court of the United States.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY, Defendant in Error.

Statement.

To the Honorable the Supreme Court of the United States:

The Plaintiff in Error states that it intends to rely on all the errors assigned. That the parts of the record which it thinks necessary for the consideration thereof, are:

1. The writ of Error.
2. The return.
3. The printed State of the Case in the Court of Errors.
4. The Opinion in the Supreme Court.
5. The Judgment in the Supreme Court.
6. The check list.
7. The majority opinion in the Court of Errors.
8. The dissenting opinion in the Court of Errors.
9. The Judgment of the Court of Errors.
10. The Judgment in the Supreme Court, on the remittitur.
11. The Assignment of Errors.

Dated August 8th, 1910.

JAMES B. VREDENBURGH,
Attorney of Plaintiff in Error.

156 [Endorsed:] 542.10/22152. Supreme Court of the United States. New York Central & Hudson River Railroad Company, Pl't'ff in Error, vs. The Board of Chosen Freeholders of Hudson County, Def't in Error. Statement. James B. Vredenburgh, Attorneys, 1 Exchange Place, Jersey City, N. J.

157 Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY,
Defendant in Error.

To John Griffin, Esq., Attorney of Defendant in Error:

Enclosed, find Statement duly filed in the above matter.

Yours truly,

VREDENBURGH, WALL & CAREY,
Att'ys of Plaintiff in Error.

Dated August 9th, 1910.

158 Supreme Court of the United States.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.
Plaintiff in Error,
vs.
THE BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY,
Defendant in Error.

Statement.

To the Honorable the Supreme Court of the United States:

The Plaintiff in Error states that it intends to rely on all the errors assigned. That the parts of the record which it thinks necessary for the consideration thereof, are:

1. The writ of Error.
2. The Return.
3. The Printed State of the Case in the Court of Errors.
4. The Opinion in the Supreme Court.
5. The Judgment in the Supreme Court.
6. The check list.
7. The majority opinion in the Court of Errors.
8. The dissenting opinion in the Court of Errors.
9. The judgment of the Court of Errors.
10. The Judgment in the Supreme Court, on the remittitur.
11. The Assignment of Errors.

Dated August 8th, 1910.

JAMES B. VREDENBURGH,
Attorneys of Plaintiff in Error.

159 [Endorsed:] 542—10/22152. Supreme Court of the United States. New York Central & Hudson River Railroad Company, Pl'ff in Error, vs. The Board of Chosen Freeholders of Hudson County, Def't in Error. Statement. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Due service

of a copy of the within Statement is acknowledged this eleventh (11th) day of August, 1910. John Griffin, Att'y of Defendant in Error.

160 [Endorsed:] File No. 22,152. Supreme Court U. S., October Term, 1910. Term No. 542. The N. Y. Central & Hudson River R. R. Co., P. E., vs. The Board of Chosen Freeholders of the County of Hudson. Statement of errors relied on and designation by plaintiff in error of parts of record to be printed. Filed August 10, 1910.

Endorsed on cover: File No. 22,152. New Jersey Supreme Court. Term No. 274. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. The Board of Chosen Freeholders of the County of Hudson. Filed May 10th, 1910. File No. 22,152.

8

FILED.
SEP 17 1912
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1912

No. 50

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,

Defendant in Error.

Writ of Error to the Supreme Court of the State of New Jersey

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This case arises upon two separate resolutions adopted July 6, 1905, by the Board of Chosen Freeholders of Hudson County, New Jersey, fixing rates for ferriage across the Hudson River from Weehawken and West New York, in the State of New Jersey, to the City of New York. One of these resolutions fixes a rate of three cents for each foot passenger over ten years of age, and two cents for younger foot passengers carried from New Jersey to New York (Rec. pp. 10–11). The other resolution fixes the rates to be taken for the round trip, commencing on the New Jersey shore, at six cents for

foot passengers over ten years of age, and four cents for younger passengers (Rec. pp. 9–10). These two resolutions are distinct each from the other, and were intended as separate and independent acts of State jurisdiction.

To review these resolutions the New York Central Railroad Company, being the lessee of two ferries organized under New Jersey law and operating across the Hudson River between Weehawken and West New York, in the State of New Jersey, and the City of New York, on the opposite side of the river, instituted proceedings by writ of certiorari from the Supreme Court of the State of New Jersey. The decision of that court, rendered February 25, 1907, set aside both resolutions as being an invasion of the exclusive Federal jurisdiction to regulate commerce among the States, and, furthermore, as in conflict with the Interstate Commerce Act.

New York Central R. Co. vs. Board, 74 N. J. L. 367 (Rec. pp. 50–57).

This decision was reversed by the Court of Errors and Appeals of New Jersey on June 14, 1909.

New York Central R. Co. vs. Board, 76 N. J. L. 664 (Rec. pp. 57–71).

The questions now before the Court lie, therefore, within a narrow compass. The first resolution presents the question whether either the constitutional grant to Congress of power to regulate commerce among the States, or Federal legislation under this grant, has deprived the States of power to regulate ferry rates for transportation out of the State across boundary streams. Under the second resolution the

further question arises whether, if the States have this power, a round trip is to be regarded, so far as concerns the amount of fare to be paid by the passenger, as a single service originating and partly performed in the State of first departure, or whether the crossings must for all purposes be separately considered.

The assignments of error assert also, as to both resolutions, that the rates fixed by the Board are so inadequate compensation for the ferry service as to amount to a taking of property without compensation, in violation of the Fourteenth Amendment to the Constitution. The brief for plaintiff in error presents neither a statement of facts nor an argument in support of this proposition. The contention seems, indeed, to have been abandoned in the trial court, for the evidence on this branch of the case is so incomplete that the New Jersey Court of Appeals dismissed the subject with the remark that "the record presents no legal question for this court" (Rec. p. 71).

Before entering upon these subjects it is necessary to speak of a question which has been much discussed, but which is not in the case.

Railroad rates, or rates for transportation partly by land and partly by water, are not involved in this proceeding.

Plaintiff in error, The New York Central & Hudson River Railroad Company, possesses, as lessee, the West Shore Railroad extending from the City of Buffalo through the State of New York, and through part of the State of New Jersey to Weehawken on the Hudson River, opposite West 42d Street, New York.

The New York, Ontario & Western Railroad also has its terminal at Weehawken.

The Central Company also possesses, as lessee, the Weehawken Ferry and the West New York Ferry, and over both of these ferries many railway passengers, with their baggage and much railway freight, mail and express matter, are daily carried across the Hudson River from the railroad terminals in the State of New Jersey to the State of New York, under rates established for transportation partly by rail and partly by water, and which for this reason are subject to regulation by the Interstate Commerce Commission, and beyond State jurisdiction. These rates are not within the operation of the resolutions adopted by the Board of Freeholders. Were there room for doubt upon this point, that doubt would be removed by the holding of the Court of Errors and Appeals that the resolutions apply only to ferriage which is "disconnected from the railroad transportation" (Rec. pp. 70, 58). This decision of a State court fixing the construction of an ordinance adopted under State authority, will be accepted in this Court as final.

Collins vs. Texas, 32 Sup. Ct. Rep. p. 286;
Missouri Pacific Ry. Co. vs. Larabee Mills, 211 U. S. 612;
Louisville &c. R. Co. vs. Mississippi, 133 U. S. 587;
Richmond vs. Smith, 15 Wall. 429;
Gut vs. State, 9 Wall. 35;
Randall vs. Brigham, 7 Wall. 523;
Provident Institution vs. Massachusetts, 6 Wall. 611;

It is, therefore, unnecessary here to present an argument supporting the decision of the New Jersey

courts in this respect, or to argue that the authority over ferry rates given to Freeholders by the New Jersey Act of 1799 is undiminished by the New Jersey statute of 1903, which counsel for plaintiff in error set out on page 5 of their brief. Both of these questions relate exclusively to the construction of State laws; both were argued and determined by the State courts (as to construction of Freeholders' ordinance, Rec. pp. 70, 58; as to statute of 1903, Rec. p. 70), and these rulings will not be reviewed by this Court.

The questions which arise on the present record are Federal questions exclusively, and concern the local service of ferriage, which has no relation to the railway. The Weehawken Ferry for many of its passengers, particularly those going to and from work in the morning and evening, or for children on their way to or returning from school, amounts to a continuation of West 42d Street or of Franklin Street across the river, performing upon the water—but on a much reduced scale—the service which the street cars connecting with the ferry at each of its termini, perform on land. Transportation for the distance of a mile or so, even though conducted upon a boundary stream, when considered solely in relation to the residents of the neighborhood, is not a subject of national concern, while on the other hand it is a subject which for successful control demands an intimate knowledge of local conditions. Street railways, whether in large or small towns, are railways still, whose lines may cover hundreds of miles, and commonly, even in the smallest communities, extend from some suburb into the municipal center. Their earnings then average good miles with bad, and their expenses are determined by laws of car mileage. Ferries are subject to

no laws but those of locality.[1] Motor-boats, rope-ferries and steam ferries offer no laws of average mileage expense, and in the service demanded in different places, or at different situations in the same town, the variations are greater still. This is particularly true of New York, a city situated upon islands, and in which the water has been more important as an avenue of transportation than any thoroughfare on land.

The part of the population of the City of New York which is located upon Manhattan Island is less than half the population of the whole city, and much less than half of what the city would be were that part of this great community which is located on the West side of the Hudson River included within the city limits. About a third of the city is on Long Island. Another large part is on Staten Island, while just outside the city limits, but an integral part of the same business community, is the large population of Bergen, Bayonne, Jersey City, Hoboken, Weehawken, West New York and North Hudson towns. During substantially the whole of New York history the principal means of communication between the different islands upon which the city is built has been the ferries which fringe the Manhattan shore and cover the city waters. About thirty years ago a bridge was built spanning the East River and connecting lower Manhattan Island and Brooklyn. In 1903 a second bridge was completed, and within the last three years two more bridges have been opened connecting Man-

[1] "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments." (*Railroad Co. vs. Maryland*, 21 Wall. 456, 470; *Pullman Co. vs. Twombly*, 29 Fed. 658, 666.)

hattan and Long Island. Still more recently tunnels have been opened under the East River and under the Hudson River, one tunnel under each river being the property of the Pennsylvania Railway, the other substantially an extension of urban street-car service. Notwithstanding these recent developments, however, the city is still dependent upon the ferries which have been so long, and until recent years practically the sole, means of communication between separated portions of the city, and which, so far as Manhattan Island is concerned, have constituted its vital connection with the world.

These ferries differ in character in different locations, at the same time that each to a certain extent has practically a monopoly of traffic along its line. Some ferries, like the West 42d Street ferry, are short; some, like the 23d Street ferries or some of the Brooklyn ferries, are long. Some run boats at short, others at long, intervals; some maintain a fast service, some slow. Under such conditions a regulating authority is necessary, and throughout their history the ferries have been regulated by local authorities. The particular statute attacked in the present case is the New Jersey Act of February 6, 1799, printed as an Appendix to this brief,—a statute long applied to Hudson River ferries, and which, in 1853, was sustained in this application by the Court of Errors and Appeals of New Jersey (*Board of Freeholders vs. State,* 24 N. J. L. 718) in a decision which has been cited and approved by this Court (*Conway vs. Taylor's Executor,* 1 Black 603, 630), and which the Supreme Court of Mississippi has termed a "well-considered and lucid opinion" (*Marshall vs. Grimes,* 41 Miss. 27).

BRIEF AND INDEX

I

The resolutions of the Board of Freeholders are not invalid as a regulation of commerce among the States.

A. FEDERAL POWER OVER COMMERCE AMONG THE STATES IS EXCLUSIVE ONLY IN MATTERS OF GENERAL CONCERN.

IN ALL LOCAL MATTERS STATE STATUTES ARE VALID UNTIL SUPERSEDED BY CONGRESS. (Argument, post, p. 18.)

Cooley vs. Port Wardens, 12 How. 310;
Mobile vs. Kimball, 102 U. S. 691, 702;
Atlantic &c. Company vs. Philadelphia, 190 U. S. 160;
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Wabash Railway vs. Illinois, 118 U. S. 557;
Morgan vs. Louisiana, 118 U. S. 455;
Cardwell vs. Bridge Co., 113 U. S. 205, 210;
Willoughby on the Federal Constitution, Sec. 309.

The power to regulate commerce is given to Congress, not to the courts. The question whether a particular statute of a State is prohibited by congressional silence, is a question for Congress. State laws should not be held void except in cases so clear that Congress could not overrule the judicial decision (p. 22).

Thayer, Cases on Const. Law 2190–2191.

B. REGULATION OF FERRY RATES IS A MATTER OF LOCAL CONCERN WITHIN STATE JURISDICTION (p. 24). This is shown

1. *By the recognized constitutional practice. The States always have regulated ferriage alike over intra-State and boundary streams* (p. 26).

Arguments supporting this proposition will be based on legislative history of State ferry regulations.

2. *By the existing statutes under which the States now regulate ferriage over intra-State and boundary streams* (p. 31).

Arguments supporting this proposition will be based on existing State statutes.

3. *The subject is one which demands intimate knowledge of local conditions. State legislatures have never been able to deal with ferriage by general law, and have turned the subject over to local town and county authorities. It would be impossible for Congress to perform the work now done by supervisors, county commissioners, boards of freeholders, &c.* (p. 32).

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"Whereas it has been found by experience that "great advantage has been taken by ferrymen "demanding unreasonable prices for their ser- "vices; And whereas this assembly cannot so "well distinguish between the several rivers and "the several parts of said rivers, ponds or lakes, "on account of distance, swiftness of water, num- "ber of travelers, &c. Therefore, &c. Be it "enacted, &c., that the magistrates, selectmen and "constables of the several towns" have authority to deal with the matter.

Vermont Act of Feb. 27, 1787. Session Laws, p. 70.

4. *The decisions of this Court and of the State courts support the existing practice which recognizes State jurisdiction* (p. 35).

A practical and long-continued construction of the Constitution by the States and by Congress is conclusive in this Court.

Stuart vs. Laird, 1 Cranch 299.

"For this court now to decide that the power "did not exist in the States, and that all they "had done in this respect, was void from the "beginning, would overthrow and annul entire "codes of State legislation. . . . We would by "our decision, expunge more State laws and "city corporate regulations than Congress is "likely to make in a century on the same sub- "ject, and on no better assumption than that "Congress and the State legislatures had been "altogether mistaken as to their respective pow- "ers, for fifty years and more. If long usage, "general acquiescence, and the absence of com-

"plaint, can settle the interpretation of the clause "in question, then it should be deemed as settled "in conformity to the usage by the courts."

License Cases, 5 How. 507, 607.

In 1861 this Court, referring to the history of regulation of ferries over boundary streams and intra-State streams, held "three quarters of a century of practical interpretation of the Constitution" a conclusive interpretation.

Conway vs. Taylor's Executor, 1 Black 603;
Carroll vs. Campbell, 108 Mo. 550, 564–565.

This practice, continued now for an additional half-century, is no less conclusive in the case at bar. Unless this rule be followed and the course of governmental administration by other branches of government and by the States be recognized, the separation of powers, and government by three coördinate departments would be impossible.

(*a*) Regulation of ferries on intra-State and boundary streams was, until 1885, considered a matter of State police jurisdiction beyond Federal authority (p. 39).

Gibbons vs. Ogden, 9 Wheat. 1. (Mr. Webster's statement of the issue between counsel, which the Court decided, is on pp. 18, 20.)
Conway vs. Taylor's Executor, 1 Black 603;
Fanning vs. Gregoire, 16 How. 524;
Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, affirming 102 Ill. 560;
Mills vs. County of St. Clair, 2 Gilm. (Ill.) 197; affirmed 8 How. (U. S.) 569;

People vs. Babcock, 11 Wend. 586 (opinion by Judge Samuel Nelson, later of this Court);
See, also, opinion of Mr. Justice Nelson in *Ferry Co. vs. United States,* 5 Blatch. 198;
Chilvers vs. People, 11 Mich. 43;
Marshall vs. Grimes, 41 Miss. 27;
Mayor &c. vs. Longstreet, 64 How. Pr. 30;
Gould on Waters, Sec. 35.

(*b*) The decision of the Gloucester Ferry case, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive State jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute (p. 45).

The legal definition of a ferry refers to the point of departure as the situs of the ferry. The ferry franchise consists in the right of transporting from that point (pp. 45–49).

Conway vs. Taylor's Executor, 1 Black 603;
Memphis vs. Overton, 3 Yerg. (Tenn.) 387, 390;
State vs. Faudre, 54 W. Va. 122;
Power vs. Village of Athens, 99 N. Y. 592; 26 Hun 282.
Massachusetts, Act of 1641, Laws 1792–1800, p. 965;
West Virginia Code, 1906, Chap. 44, Sec. 15.

Under this definition no conflict of laws can arise upon boundary streams, for a municipality or State upon one side of the stream has complete control of ferriage from its own shore, and can-

not interfere with ferriage from the opposite shore.

The franchise to leave a State comes from State law, which imposes also the duty of the carrier to receive, carry and deliver (pp. 49–52).

Louisville Ferry Co. vs. Kentucky, 188 U. S. 385, 394;

Bowman vs. Chicago &c. Railway, 115 U. S. 611, 615.

"The Constitution does not confer the right of intercourse between State and State."

Gibbons vs. Ogden, 9 Wheat. at p. 211;

Federal Common Law and Interstate Carriers, 9 Columbia Law Rev. 375;

Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 23–37; 124–130;

Re Transportation of Fruit, 10 Int. Com. Rep. 360.

Some recent cases suggest that there is also a Federal right to engage in interstate commerce, but this proposition has never been advanced without dissent, and in any event does not deny the right derived from State law. The State franchise is the historic right upon which the common law of carriers is built.

Crouch vs. London & N. W. Ry., 14 C. B. 255.

"The privilege of keeping a ferry" over boundary streams "with the right to take toll for "passengers and freight is grantable by the "State, to be exercised within such limits and "under such regulations as may be required for "the safety, comfort and convenience of the "public."

Gloucester Ferry Case (1884), 114 U. S. 196, 217;
State vs. Faudre (1903), 54 W. Va. 122;
Ferry Co. vs. Russell (1902), 52 W. Va. 356;
Cross vs. Hopkins (1873), 6 W. Va. 323;
Carroll vs. Campbell (1892), 108 Mo. 550;
State vs. Sickmann (1896), 65 Mo. App. 499;
Tugwell vs. Eagle Pass Ferry Co. (1888), 74 Tex. 480;
Parsons vs. Hunt (1905), 98 Tex. 420;
Nixon vs. Reid (1896), 8 So. Dak. 507;
Hatten vs. Turman (1907), 123 Ky. 844.

The majority opinion in the Covington Bridge case, 154 U. S. 204, considered in connection with the facts before the Court announces no new rule (pp. 54–61).

That the cases which recognize State power to regulate ferries over boundary streams are still authoritative, is shown by the fact that in *Williams vs. Wing*, 177 U. S. 601, this Court based its decision upon *Fanning vs. Gregoire*, 16 How. 524, holding that case "in point and decisive" (177 U. S. 603).

The Louisville Ferry case, 188 U. S. 385, approves *Conway vs. Taylor's Executor*, 1 Black. 603 (pp. 62–63).

See, also, *St. Clair County vs. Transfer Co.*, 192 U. S. 454;
Burlington &c. Ferry Co. vs. Davies, 48 Iowa, 133;
Phillips vs. Bloomington, 1 Greene (Iowa) 498, 502;
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Columbia &c. Bridge Co. vs. Geisse, 38 N. J. L. 39;
Gear vs. Bullerdike, 34 Ill. 74.

5. *The second resolution, regulating rates for a round trip starting from the New Jersey side, is within the jurisdiction of New Jersey* (p. 63).

State vs. Sickmann, 65 Mo. App. 499.

C. THERE IS NO FEDERAL STATUTE WHICH SUPERSEDES STATE JURISDICTION TO REGULATE FERRIES (p. 64).

The New Jersey courts have construed the regulations involved in the case at bar as applying only to such ferry service as is "disconnected from railroad transportation" (Rec. pp. 70, 58).

The distinction between ordinary ferriage and ferriage which is connected with railroad transportation is well recognized.

Interstate Commerce Act, Sec. 1;
St. Clair County vs. Transfer Co., 192 U. S. 454.

The construction of a State law by the State courts is accepted in this Court as final.

Collins vs. Texas, 32 Sup. Ct. Rep. 286;
Missouri Pacific Ry. Co. vs. Larabee Mills, 211 U. S. 612;
Louisville &c. R. Co. vs. Mississippi, 133 U. S. 587;
Provident Institution vs. Massachusetts, 6 Wall. 611;
Randall vs. Brigham, 7 Wall. 523;
Gut vs. State, 9 Wall. 35;

Richmond vs. Smith, 15 Wall. 429;
Leffingwell vs. Warren, 2 Black 599.

(*a*) *The Interstate Commerce Act is not involved* (p. 64).

The statute applies only to "transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common control."

Ferriage "disconnected from railroad transportation" is not affected.

Goodrich Co. vs. Interstate Commerce Commission, 190 Fed. 943;
Interstate Commerce Commission vs. Goodrich Co., 32 Sup. Ct. Rep. 416.

(*b*) *Federal statutes concerning enrollment and inspection of vessel, licensing officers, etc., are not involved* (p. 68).

Conway vs. Taylor's Executor, 1 Black 603;
Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365;
Mayor, etc., vs. Starin, 106 N. Y. 1;
Mayor, etc., vs. Longstreet, 64 How. Pr. 30;
Midland Ferry Co. vs. Wilson, 28 N. J. Eq. 537;
Carroll vs. Campbell, 108 Mo. 550, 562–563;
Marshall vs. Grimes, 41 Miss. 27;
People vs. Babcock, 11 Wend. 586;
Chilvers vs. People, 11 Mich. 43.

These statutes govern all boats navigating public waters of the United States, whether crossing State lines or not. To give them the effect for which counsel contend would deprive the States

of all power over ferries—even across intra-State streams.

(c) *The Federal statute of 1866 is not involved* (p. 70).

The history of the statute as well as its express provisions show that, like the Interstate Commerce Act, this is a railroad statute. It has been in force forty-six years, and has never been applied to ferriage disconnected from railroad transportation.

Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 95, 209.

II

The rates established by the Board of Freeholders are not invalid as taking the property of plaintiff in error without compensation (p. 73).

Argument supporting this proposition will be based upon the facts shown in the record.

The rates have been in existence for several years, and should not now be disturbed without considering the results of this practical test.

Wilcox vs. Gas Company, 212 U. S. 19, 44.

Appendix

NEW JERSEY ACT OF 1799 (p. 76).

ARGUMENT

I

The resolutions of the Board of Freeholders are not invalid as a regulation of commerce among the States.

A. FEDERAL POWER OVER COMMERCE AMONG THE STATES IS EXCLUSIVE OF STATE LEGISLATION ONLY IN MATTERS OF GENERAL CONCERN.

There is no constitutional provision which relates specifically to the subject of governmental power to regulate rates charged by common carriers for interstate transportation. So far as the Constitution is concerned, the whole story is told in the twenty-one words of the Commerce Clause—

> "The Congress shall have power . . . to regulate "commerce with foreign nations, and among the sev- "eral States, and with the Indian tribes."

It was probably understood from the beginning of our present government that in some respects this power was exclusive, depriving the States of all jurisdiction over certain aspects of the subject. This was the express decision of the Court in the case of *Gibbons vs. Ogden,* 9 Wheat. 1, a decision which accorded with previous constitutional practice and with the

best public opinion of the time. It was published in the *New York Evening Post* on March 8, 1824, with the remark, "We presume it will command the assent of every impartial mind competent to embrace such a subject," and this was the general nature of the contemporary comment.

See *Louisville Public Advertiser*, March 27, 1824.

But although the decision announced no new doctrine, it gave great prominence to a question which was rapidly becoming urgent—the question of the nature of the Federal power and the limits of its exclusive jurisdiction; for although it be admitted that in some respects interstate commerce has been removed from State control, there are other respects in which, so long as there be no Federal statute in the way, the State power is undiminished. Pilotage, quarantine, licensing of peddlers, stoppage of trains, sales of imported liquors at night, or to minors or drunkards, transportation of explosives—in all these, and in many other matters, State authority was undiminished by the Commerce Clause, and still exists unless excluded by some Federal statute. It became a matter of great importance, therefore, after the decision of *Gibbons vs. Ogden,* to find some line which should define the boundaries of the exclusive Federal power, and should indicate the extent of the field yet open to State legislation. This subject was considered in *Brown vs. Maryland,* 12 Wheat. 419, and *New York vs. Miln,* 11 Pet. 102, and brought out the dissensions of the License cases, 5 How. 504, and the Passenger cases, 7 How. 282, for, difficult as the question was in itself, it was vastly complicated by the issues and con-

flicting interests which arose out of the institution of slavery. A final solution, therefore, was not reached until the case of *Cooley vs. Port Wardens*, 12 How. 310, decided in 1851. In this case Mr. Justice Curtis took up a suggestion made by Daniel Webster in the argument of *Gibbons vs. Ogden*, first formulated and definitely expressed by Mr. Justice Woodbury in the License and Passenger cases, and speaking for the Court, announced the now well-settled rule dividing Federal and State jurisdictions. Mr. Justice Curtis said:

> "The diversities of opinion which have existed on "this subject, have arisen from the different views taken "of the nature of this power. But when the nature of "a power like this is spoken of, when it is said that "the nature of the power requires that it should be "exercised exclusively by Congress, it must be intended "to refer to the subjects of that power and to say they "are of such a nature as to require exclusive legislation "by Congress. Now, the power to regulate commerce, "embraces a vast field, containing not only many, but "exceedingly various subjects, quite unlike in their na- "ture; some imperatively demanding a single uniform "rule, operating equally on the commerce of the United "States in every port; and some, like the subject now "in question, as imperatively demanding that diversity, "which alone can meet the local necessities of naviga- "tion. Either absolutely to affirm, or deny, that the "nature of this power requires exclusive legislation by "Congress, is to lose sight of the nature of the subjects "of this power, and to assert concerning all of them "what is really applicable but to a part" (5 How. at p. 319).

The doctrine thus announced has never since that time been questioned. It is established law that in

matters of general interest requiring uniform legislation throughout the country, the inaction of Congress is to be taken as a declaration of its will that commerce shall be free. All these matters are, by the Constitution itself, removed from State authority. On the other hand, in local matters the inaction of Congress is to be taken as a declaration that, for the time being, and until it sees fit to act, they may be regulated by State authority. Of this rule, which has been followed in every case upon the subject in this Court, it has been said that it "may be considered as expressing the final judgment of the Court."

Mobile vs. Kimball, 102 U. S. 691, 702;
Atlantic & Pacific Co. vs. Philadelphia, 190 U. S. 160;
Bowman vs. Railroad Co., 125 U. S. 465, 507;
Leisy vs. Hardin, 135 U. S. 100;
Stoughtenburgh vs. Hennick, 129 U. S. 141;
Telegraph Co. vs. Pendleton, 122 U. S. 347;
Ouachita Packet Co. vs. Aiken, 121 U. S. 444;
Robbins vs. Taxing District, 120 U. S. 489;
Wabash Railway vs. Illinois, 118 U. S. 557;
Morgan vs. Louisiana, 118 U. S. 455;
Cardwell vs. Bridge Co., 113 U. S. 205, 210;
Willoughby on the Federal Constitution, Sec. 309.

The restriction upon State legislation contained in the Commerce Clause, arises, then, by implication and by implication alone. The subjects of the Federal power, it is shown, are exceedingly various, "some imperatively demanding a single uniform rule . . . and some as imperatively demanding that diversity which alone can meet the local necessities. . . ." In

some cases Federal jurisdiction, then, must be exclusive; in other cases it cannot be exclusive.

This brief proposition, universally recognized as a sound interpretation of the Constitution, forms nothing less than the entire foundation of the existing system of doctrines guiding the application of the Commerce Clause. In all subjects of general importance the silence of Congress is to be taken as an expression of its will that commerce shall be free and uncontrolled by any State legislation. In all local matters the silence of Congress is to be taken as an expression of its will that State legislation shall be valid and effective until superseded by Federal statute.

The question as to the line of distinction which separates these two classes of cases, is by the statement of the rule, a legislative and not—except in extreme cases—a judicial question. State statutes are not conditioned upon judicial approval, "for it is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce. . . . The courts can never take the initiative on this subject." (118 U. S. 585). The question whether a given subject admits of but one uniform system of regulation, is a legislative question, except in cases, like *Gibbons vs. Ogden*, for example, so clear that the legislature cannot legitimately supersede the judicial determination. Upon this subject Professor Thayer said:

> "As regards State regulations of commerce in mat-
> "ters which do not require uniformity of rule, it is
> "admitted that the silence of Congress is not conclusive
> "against them; some positive intervention of Congress
> "is required. If, then, the courts would know in any
> "given case of a regulation of commerce what the
> "silence of Congress means, how are they to tell, unless

"they first determine under which head the given regu-
"lation belongs, that of regulations requiring a uniform
"rule, or of those which do not? . . . It may then be
"conjectured that the decisions of the Federal courts
"are likely to incline, as time goes on, to the side of
"leaving it to Congress to check such legislation of the
"States as may be challenged on the ground now in
"question, and of limiting its own action, in respect to
"such cases, to that class of State enactments which
"is so clearly unconstitutional that no consent of Con-
"gress could help the matter out."

Thayer, Cases on Constitutional Law, 2190–2191.

Applying these rules to the case now at bar, it is essentially a legislative question whether Congress desires to supersede the existing system of ferry control. Congress has so understood the situation, and the history of the subject leaves no uncertainty as to the meaning of congressional silence.

Until the decision of the Gloucester Ferry case in 1885, the constitutional rule governing the subject held that regulation of ferries belonged to the reserved police powers of the States, and was not within Federal power at all. Congress during this period never asserted authority upon the subject nor questioned State jurisdiction. Since the Gloucester Ferry case, Federal jurisdiction to legislate concerning ferriage has been undoubted, but Congress has not legislated, and the States have not only enforced previously existing laws, but have enacted many new ones. The silence of Congress, then, has manifested continued acquiescence in the local regulation of a subject which from the beginning has been administered as of local character.

B. REGULATION OF FERRY RATES IS A MATTER OF LOCAL CONCERN WITHIN STATE JURISDICTION.

There is no doubt but that interstate railway rates, and the rates of those other great agencies of transportation which have created a network of lines and an interweaving system of charges extending throughout the country, are matters of general concern, and, even in the absence of Federal statute, are beyond State jurisdiction. This rule, first established in *Wabash Railway vs. Illinois,* 118 U. S. 557, has been followed in many cases, and is amply supported by the history of the last twenty-five years.

The railroad rule, however, is an exceptional rule, the product of an extraordinary history elsewhere told (Chap. V, Federal Power over Carriers and Corporations). In most of their important relations to the public and to individuals, railways are the subject of statutes and rules of decision, which are not applied to individuals or to other agents of commerce; as this Court said in another connection, "a railroad is a peculiar property" (*Wood vs. Guarantee Trust Co.,* 128 U. S. 416, 421). The difference appears conspicuously in the matter of charges. Railway rates are of national importance. The rates of minor agencies, such as ferries or hackmen, are of local importance only.

Except as connected with railways, ferries are isolated. Their transportation generally covers less than a mile and often is measured in feet. It is a matter of fact and of history that ferries have never been and are not now governed by the railway rule, and it is a matter of law that the same rule which establishes exclusive Federal jurisdiction in matters of national

concern like railway rates, is the rule under which the States, from the beginning of our government to the present time, have regulated and still regulate all ferries within their limits or on their borders.

Throughout the thousands of miles traversed by the great interstate waterways of the country,—the Connecticut, Hudson, Ohio, Mississippi, Missouri and St. Croix rivers, to say nothing of smaller streams,—there are ferries operating by methods and under conditions which present the widest possible divergence. In many places the old rope- or chain-ferry is still found; in other places the boat is propelled by oars or poles; at more travelled crossings there are steam ferries, while in recent years the motor-boat has come into use for foot passengers. It is not only, however, in the means of transportation that these ferries differ from each other. Some must provide for carrying cattle, others for freight. Some maintain a constant service, while others, in country districts, may not average half a dozen passengers a day. The cases are not a few where the ferryman is a near-by farmer, principally occupied upon his land; but, under the law, a horn or other signal is kept by the river-side, and a penalty is imposed for delay in performing the public duty of ferriage. Counsel for appellees in *Conway vs. Taylor's Executor* well stated the problem of ferry regulation as fifty years ago it related to the State of Kentucky alone. Mr. Stevenson said:

> "There are twenty-seven counties on the Ohio and "Mississippi rivers in Kentucky, containing perhaps "300 ferries. They are judicial and legislative grants, "within prescribed distances, to the grantees of the soil. "The statutes regulating them impose certain condi- "tions, and exact of the grantees proper accommoda-

"tions, skilful ferrymen, and safe boats and good land-
"ings. Bond and security are required of the grantees
"for a compliance with all the regulations of the
"statute, and for this the State grants exclusive li-
"censes and regulates the rate of ferriage. It is essen-
"tial to the public accommodation of the citizens of
"Kentucky that these ferries and their landings should
"be constantly kept up. . . . How could Congress
"know anything of the wants of a ferry in the various
"counties of Kentucky?" (1 Black pp. 617–618).

The rules by which such services as these should be governed are emphatically matters of local importance, and this is true also even where the travel is greatest. The ferries in New York differ in length of distance traversed, in the frequency of trips, in the time of day when service should be at its maximum, in the speed required, and in other respects. All these things—in New York as on the Ohio or Missouri rivers—are matters for regulation by local authorities. From the beginning of our government to the present time, the States have regulated ferry service and ferry charges, both across streams wholly within their limits and across boundary streams.

1. *The local nature of ferry regulations is shown by the recognized constitutional practice.*

It is impossible to give a complete history of State legislation on this subject, both because of the great number of statutes, and because the subject has been turned over by the different States to local authorities, whose ordinances cannot be collected. For the present purposes it is sufficient to give in a foot-note an outline

of special legislation in a few States.[1] The rate regulation embodied in the legislation we thus cite rests upon the same basis as regulation in statutes of general application. Of course if regulation of ferry rates across boundary streams is beyond State power,

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[1] *New Hampshire:* Ferries across Connecticut River. Act of July 5, 1863, Ch. 2822, p. 2781, in which tolls are fixed in the Statute. Acts of Dec. 20, 1844, Ch. 206, p. 211, and Act of July 5, 1867, Ch. 86, p. 64, in which tolls are to be fixed by courts of common pleas.

Vermont: Ferries across Lake Champlain, rates being regulated by selectmen. Act of Nov. 4, 1799, Laws p. 63; Act of Oct. 27, 1801, Laws p. 72; Act of Oct. 26, 1801, Laws p. 71; Act of Nov. 1, 1804, Laws p. 58; Act of Oct. 28, 1805, Laws p. 28; Act of Oct. 26, 1807, Ch. 26, p. 36; Act of Oct. 26, 1807, Ch. 27, p. 38; Act of Oct. 26, 1807, Ch. 30, p. 44; Act of Oct. 31, 1810, Ch. 66, p. 89; Act of Oct. 29, 1811, Ch. 80, p. 93; Act of Oct. 20, 1812, Ch. 18, p. 21; Act of Oct. 31, 1812, Ch. 75, p. 95; Act of Nov. 3, 1812, Ch. 88, p. 111; Act of Nov. 16, 1813, Ch. 123, p. 166; Act of Nov. 2, 1814, Ch. 35, p. 37; Act of Nov. 4, 1816, Ch. 76, p. 78; Act of Nov. 5, 1816, Ch. 122, p. 130; Act of Oct. 24, 1818, Ch. 12, p. 230; Act of Nov. 7, 1818, Ch. 13, p. 231; Act of Nov. 8, 1819, Ch. 131, p. 151; Act of Nov. 1, 1820, Ch. 113, p. 139; Act of Nov. 3, 1820, Ch. 114, p. 141; Act of Nov. 4, 1820, Ch. 115, p. 143; Act of Oct. 26, 1824, Ch. 64, p. 102; Act of Oct. 30, 1824, Ch. 67, p. 107; Act of Nov. 2, 1824, Ch. 68, p. 108; Act of Nov. 8, 1825, Ch. 78, p. 125; Act of Nov. 8, 1825, Ch. 79, p. 125; Act of Nov. 9, 1825, Ch. 80, p. 136; Act of Nov. 4, 1826, Ch. 37, p. 51; Act of Nov. 6, 1826, Ch. 38, p. 51; Act of Nov. 6, 1826, Ch. 40, p. 52; Act of Oct. 25, 1828, Ch. 55, p. 56; Act of Oct. 22, 1829, Ch. 47, p. 73; Act of Oct. 22, 1829, Ch. 48, p. 73; Act of Nov. 1, 1830, Ch. 46, p. 57; Act of Nov. 2, 1830, Ch. 49, p. 58; Act of Oct. 26, 1833, Ch. 60, p. 102; Act of Nov. 7, 1833, Ch. 59, p. 101; Act of Oct. 28, 1840, Ch. 55, p. 53; Act of Oct. 29, 1840, Ch. 56, p. 54; Act of Oct. 27, 1847, Ch. 46, p. 119; Act of Nov. 6, 1850, Ch. 136, p. 162; Act of Nov. 30, 1853, Ch. 147, p. 190; Act of Oct. 30, 1860, Ch. 127, p. 166; Act of Nov. 20, 1861, Ch. 126, p. 161; Act of Nov. 13, 1890, Ch. 116, p. 187; Act of Nov. 21, 1890, Ch. 117, p. 188; Act of Nov. 26, 1900, Ch. 259, p. 355. Rates regulated by county courts. Act of Nov. 4, 1813, Ch. 35, p. 50; Act of Nov. 21, 1823, Ch. 64, p. 81; Act of Nov. 18, 1824, Ch. 58, p. 96; Act of Nov. 18, 1864, Ch. 108, p. 142; Act

the jurisdiction cannot be acquired by any statutory insertion in ferry licenses. The question is identical as to general and special legislation—if the State have the power, State regulation is valid. If the State have not power, regulation of ferry rates is no better in one class of statutes than in the other.

Moreover, the statutes cannot be explained as judicial application of a duty arising under Federal com-

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of Oct. 31, 1866, Ch. 194, p. 285; Act of Oct. 29, 1888, Ch. 324, p. 339; Act of Nov. 11, 1896, Ch. 298, p. 457. Rates regulated by judges of county court. Act of Oct. 29, 1804, Laws p. 42.

Massachusetts: Ferry from Langdon's Island to Portsmouth, N. H. Court of General Sessions to fix tolls. Act of March 22, 1793, Laws & Resolves of Mass. 1792–3, pp. 99–101.

New York: Ferries across Lake Champlain, courts of common pleas to fix tolls. Act of March 19, 1803, Webster & Skinner's Laws, Ch. 337, p. 321; Act of March 28, 1805, W. & S., Ch. 45, p. 66; Act of April 9, 1805, W. & S., Ch. 101, p. 255; Act of April 10, 1805, W. & S., Ch. 124, p. 285; Act of March 16, 1810, Session Laws, Ch. 61, p. 16; Act of May 26, 1812, Ch. 60, p. 90; Act of April 3, 1811, Ch. 127, p. 225; Act of Feb. 25, 1813, Ch. 43, p. 41; Act of April 15, 1814, Ch. 174, p. 205; Act of April 15, 1814, Ch. 208, p. 272; Act of April 14, 1815, Ch. 189, p. 192; Act of April 21, 1818, Ch. 264, p. 285; Act of March 30, 1820, Ch. 120, p. 106; Act of Feb. 15, 1822, Ch. 29, p. 30; Act of March 4, 1824, Ch. 73, p. 62; Act of March 23, 1824, Ch. 98, p. 92; Act of April 10, 1824, Ch. 224, p. 268; Act of April 12, 1824, Ch. 227, p. 278; Act of Feb. 4, 1826, Ch. 36, p. 26; Act of March 8, 1826, Ch. 71, p. 52; Act of April 16, 1827, Ch. 315, p. 351; Act of April 5, 1828, Ch. 168, p. 195; Act of April 6, 1831, Ch. 105, p. 146. Rates regulated by county courts. Act of May 12, 1847, Ch. 288, p. 353; Act of April 6, 1869, Ch. 117, p. 203; Act of April 14, 1871, Ch. 495, p. 1038; Act of May 1, 1872, Ch. 460, p. 1067; Act of March 17, 1874, Ch. 65, p. 83; Act of May 25, 1880, Ch. 385, p. 564; Act of June 15, 1886, Ch. 674, p. 964; Act of April 20, 1901, Ch. 442, p. 1150; Act of May 31, 1907, Ch. 392, p. 822. Rates regulated by county clerk. Act of May 31, 1907, Ch. 392, p. 822. Rates fixed by statute. Ferries from Port Richmond, N. Y. to Bergen Point, N. J. Act of April 12, 1848, Ch. 306, p. 436; Act of April 11, 1860, Ch. 266, p. 470. Ferry from Holland's Hook, N. Y., to Elizabethtown, N. J. Act of April 10, 1850, Ch. 314, p. 681. Ferry from Bowman's Point to Elizabeth. Act of May 6, 1870, Ch.

mon law to charge only reasonable rates of ferriage, for the practice of State regulation arose at a time when decisions denying the existence of Federal common law were harmonious,

Wheaton vs. Peters (1834), 8 Pet. 591;
Kendall vs. United States, 12 Pet. 524;
Gatton vs. Chicago &c. Railway Co., 95 Iowa, 112;
Virginia Report of 1799–1800;

731, p. 1806. Ferry across Delaware River. Act of March 29, 1811, Ch. 80, p. 147.

Pennsylvania: Ferries across Delaware River to New York shore, rates fixed by statute. Act of March 28, 1860, Ch. 315, p. 319; Act of April 14, 1869, Laws 1870, Ch. 1279, p. 1409. Tolls to be fixed by court of quarter sessions. Act of April 18, 1855, Ch. 278, p. 261; Act of Feb. 12, 1856, Ch. 60, p. 43.

Missouri: By the Constitution of 1875 special laws relating to ferries or bridges were forbidden "except for the erection of bridges crossing streams which form boundaries between this and any other State" (Art. IV). In the twenty years preceding the adoption of this rule, the following statutes authorizing regulation of rates by county courts may be found:

Mississippi River:

Act of Feb. 13, 1855, Laws p. 516; Act of March 5, 1855, Laws p. 515; Act of Feb. 27, 1855, Laws p. 512; Act of March 5, 1855, Laws p. 135; Act of Nov. 9, 1857, Laws Adj. Session, p. 380; Act of Nov. 17, 1857, Laws Adj. Session, p. 363; Act of Nov. 17, 1857, Laws Adj. Session, p. 362; Act of March 14, 1859, Laws 1859–1860, p. 378; Act of Feb. 11, 1861, Laws 1860–1861, p. 551; Act of Jan. 30, 1860, Laws 1860–1861, p. 550; Act of March 19, 1861, Laws 1860–1861, p. 546; Act of March 23, 1863, Laws 1862–1863, p. 140; Act of Feb. 13, 1864, Laws 1863–1864, p. 320; Act of Jan. 26, 1864, Laws 1863–1864, p. 315; Act of Feb. 15, 1864, Laws 1863–1864, p. 310; Act of March 25, 1870, Laws p. 231.

Des Moines River:

Act of March 3, 1855, Laws 1854–1855, p. 517; Act of March 5, 1855, Laws 1854–1855, p. 511, extending Act of Feb. 27, 1849, Laws p. 471.

Missouri River:

Act of March 3, 1855, Laws 1854–1855, p. 229; Act of Feb. 28, 1855, Laws 1854–1855, p. 518; Act of March 5, 1855, Laws

and when, as will be shown later in this brief, it was well settled that regulation of ferriage was wholly beyond Federal jurisdiction, whether by common law or by statute.

Besides this, the regulation of rates as provided for in the statutes to which we refer was not a judicial but a legislative or administrative act. Many State statutes fixed rates of ferriage as the direct act of the legislature. Most statutes delegated authority over rates either to an administrative authority, such as selectmen, or to some other local body, such as county courts, courts of common pleas or quarter sessions, which often execute administrative as well as judicial functions; and rates so fixed were subject to legislative control, as by the Missouri statute of December 11, 1863, Laws 1863–1864, p. 318, enacting that the rates established by the County Court of Platte County should remain "as now fixed." So the State of New York, which ordinarily left ferry rates to regulation by county courts, recently gave this authority to a county clerk, Act of April 10, 1906, Chap. 179, p. 306, and Vermont, which ordinarily delegated this authority to selectmen, gave the power by the Act of October 29, 1804, Session Laws, p. 42, to individual judges of the County Court.

This is the course of legislation which counsel for the plaintiff in error now insist is unconstitutional. It is supported by a long line of decisions in both Fed-

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1854–1855, p. 511; Act of March 5, 1859, Laws 1858–1859, p. 348; Act of Jan. 6, 1860, Laws 1859–1860, p. 61; Act of December 7, 1859, Laws 1859–1860, p. 60; Act of Jan. 16, 1860, Laws 1859–1860, p. 57; Act of Feb. 8, 1864, Laws 1863–1864, p. 320; Act of Feb. 15, 1864, Laws p. 312; Act of Feb. 9, 1864, Laws 1863–1864, p. 309.

eral and State courts which counsel urge should now be overruled. The contention is revolutionary, for it not only seeks to reverse the settled practice of Federal and State governments, but in effect denies the possibility of final determination of any constitutional or legal question.

2. *The local nature of ferry regulations is shown by the existing State statutes under which ferriage over intra-State and boundary streams is now regulated.*

The statute which in some respects bears the closest resemblance to the resolutions of the Board of Freeholders involved in the case at bar, is the existing law by which Nebraska fixes a maximum rate for ferriage of foot passengers across streams forming the State boundary. This Act provides:

> "That hereafter it shall be unlawful for any person "or persons, ferry company or transfer company, en- "gaged in ferrying or transferring persons across any "river in this state, or any river forming the boundary "line of this state, to charge, demand of, or receive "from any footman, or foot passenger, more than ten "cents for any such ferriage or transfer across any of "said rivers."
>
> Nebraska Compiled Statutes of 1909, Ch. 29, Sec. 3459.

Subject to this limitation, ferry rates in Nebraska are regulated by local authorities, and this is the general practice throughout the country. We refer in a

foot-note to the statutes of twenty-two States bordering upon the principal boundary streams.[1]

3. *The subject is one which demands intimate knowledge of local conditions. Congress cannot perform the work now done by county commissioners, supervisors, boards of freeholders, police juries, &c.*

Over many thousands of miles of waterway forming the boundary of different States, the ferry service which is essential to intercourse is maintained, as has been shown, under the efficient rule of supervision by those most concerned. The traveller may be far from bridges, but if so he is never far from a ferry. Often the ferry offers the sole means of crossing, yet the rates are never excessive, and the service is maintained. There is but one way in which this can be ac-

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[1] *Massachusetts:* Ferry rates regulated by county commissioners, R. S. 1902, Chap. 55.
New Hampshire: Rates regulated by county commissioners, Public Statutes, Chap. 80, Sec. 2.
Vermont: Rates regulated by county courts, Public Statutes, 1906, Sec. 4108.
New York: County supervisors may authorize change of rates, Consolidated Laws, Chap. 11, Art. 1, Sec. 72.
New Jersey: Ferry rates regulated by boards of freeholders, Act of 1799, G. S. 1469.
Ohio: Rates regulated by court of common pleas, General Code, 1910, Sec. 5958.
Indiana: Ferry rates regulated by county commissioners, Burn's Statutes 1908, Chap. 71, Sec. 7412.
Illinois: Ferry rates regulated by county commissioners, Hurd's Stats., 1911, Chap. 55, Sec. 10.
Kentucky: Ferry rates regulated by the several county courts, Statutes of 1909, Chap. 49, Sec. 1813.
Tennessee: Ferry rates regulated by justices of county courts, Shannon's Code of 1896, Title 8, Chap. 4, Art. VI, Sec. 1717.
Mississippi: Ferry rates regulated by board of supervisors, Code of 1906, Chap. 123, Sec. 4455.

complished—by local regulation. The story is well told in the preamble to the Vermont statute of February 27, 1787, Laws of 1787, p. 70:

> "Whereas, it has been found by experience that great "advantage has been taken by ferrymen demanding "unreasonable prices for their services, And Whereas, "this assembly cannot so well distinguish between the "several rivers, and the several parts of said rivers, "ponds or lakes, on account of distance, swiftness of "water, number of travellers, &c.,"

therefore the subject was turned over to the authorities of the different towns throughout the State, a practice which still continues in Vermont, and finds its counterpart in every other State in which ferries assume any degree of importance.

Congress can legislate in regard to particular fer-

Louisiana: Ferry rates regulated by police juries, Rev. Laws 1904, Sec. 1501.

Minnesota: Ferry rates regulated by county commissioners, Revised Laws, 1905, Chap. 13, Sec. 1253.

Wisconsin: Ferry rates regulated by county boards, Stats. 1898, Chap. 53, Sec. 1349.

Iowa: Ferry rates regulated by boards of supervisors, Code of 1897, Title VIII, Chap. 3, Sec. 1589, 1593.

Missouri: Ferry rates regulated by county courts, Laws 1909, Chap. 48, Sec. 6480.

Arkansas: Ferry rates regulated by the county courts, Kerby's Digest of Statutes, 1904, Sec. 3563.

Kansas: Ferry rates regulated by county commissioners, General Statutes, 1909, Sec. 3787.

Nebraska: Ferry rates regulated by county commissioners, Com. Stats. 1909, Ch. 29, 3543.

Texas: Rates regulated by commissioners court of county, Sayles Stats., Title 97, Ch. 9, Sec. 4801.

Washington: Rates regulated by county commissioners, Remington & Ballinger's Annotated Stats., Sec. 5006.

Oregon: County courts, having power of county commissioners, Sec. 937, regulate ferry rates, General Laws, Sec. 6496.

ries and doubtless will do so, whenever occasion for Federal regulations may arise, but it is impossible that Congress could itself perform for the boundary streams of the whole country the work which the legislature of Vermont is unable to do within the narrow limits of a single State. On the other hand, the work must be done. Insignificant as each ferry may be to the nation, every ferry is important to the community served—often vitally important—and, taken together, all the interstate ferries of the country are of great moment.

How is ferry service to be instituted in the beginning? To take but one example out of very many—how is a ferry to be established across the St. Croix River from the City of Hudson, Wisconsin, to the village of Lakeland, Minnesota, if the monopoly which Wisconsin granted to Lewis Olson a year ago be abolished?

Act of June 8, 1911, Laws of 1911, Chap. 309.

How many such licenses were granted last year by town and county authorities? The ferries will not establish themselves. And once established, how are the ferries to be maintained and regulated? If it be true, as Mr. Justice Brown once suggested (154 U. S. p. 219), that a ferry license may be valid although State regulation of interstate ferry rates might be wholly void—may Lewis Olson maintain his new monopoly not as a monopoly of ferriage at the rates fixed in the statute, but as a monopoly for all it is worth?

A rule making ferriage over boundary streams a subject of exclusive Federal jurisdiction would call for immediate Federal legislation to enact a new code.

of law for a field of government yet untouched by Congress. A new class of cases would be created to crowd the docket of Federal courts. It would be necessary to appoint a large number of Federal officials to supersede throughout the country the regulations of county authorities, and,—vastly more important than all else,—an interpretation would be given to the Commerce Clause which, if applied to such minor matters as ferries, would easily include many relations of much wider concern. Local self-government could hardly survive the working out of such a rule as would support a system of United States commissioners of ferries. The perplexing questions which would arise in branches of law now resting upon the practice and decisions of a century and a quarter would be the least of the difficulties such a situation would present.

> "If the day should ever arrive (which God forbid) "when the people of the different parts of our country "shall allow their local affairs to be administered by "prefects sent from Washington, and when the self-"government of the States shall have been so far lost "as that of the Departments of France, or even so far "as that of the counties of England,—on that day the "progressive political career of the American people "will have come to an end, and the hopes that have "been built upon it for the future happiness and pros-"perity of mankind will be wrecked forever."
>
> Professor John Fiske, "The Critical Period of American History," p. 238.

4. *The decisions of this Court and of the State courts support the existing practice which recognizes State jurisdiction over ferries, and ferry rates.*

It would be strange if the unbroken and undisputed practice of the States and of Congress, from the establishment of the Constitution to the present time, were opposed to decisions of this Court; nevertheless such is the contention of counsel for plaintiff in error in the case at bar. No instance of such a division of governmental authorities can be found in any other department of constitutional law, for in all doubtful questions a doctrine once established in this Court is followed by other departments of government, while, on the other hand, this Court has always accepted a practical construction of the Constitution by other departments of government, and by the States, as entitled to great, if not controlling, influence. Under any other rule, the separation of executive, legislative and judicial functions, and government by three coördinate departments, would be impossible. Contemporaneous exposition and extensive recognition, said Mr. Justice Story, "entitle the question to be consid-"ered at rest; unless, indeed, the interpretation of the "Constitution is to be delivered over to interminable "doubt throughout the whole progress of legislation "and of national operations."

Prigg vs. Pennsylvania, 16 Pet. 539, 621.

So in *Stuart vs. Laird,* 1 Cranch 299, the Court said that practice, and acquiescence under it, for a period of several years, commencing with the organization of government, has "fixed the construction" (of the Constitution). "It is a contemporary interpretation of "the most forcible nature. This practical exposition "is too strong and obstinate to be shaken or con-"trolled. Of course the question is at rest and ought "not now to be disturbed."

This Court has never yet reversed a practical construction of the Constitution long continued and undisputed. Mr. Justice Catron, in the License cases, 5 How. 504, 507, referring to an argument then presented which denied validity to a long course of State legislation, said:

> "For this court now to decide that the power did not "exist in the States, and that all they had done in this "respect was void from the beginning, would over- "throw and annul entire codes of State legislation on "the particular subject. We would by our decision "expunge more State laws and city corporate regula- "tions than Congress is likely to make in a century on "the same subject, and on no better assumption than "that Congress and the State legislatures had been alto- "gether mistaken as to their respective powers for fifty "years and more. If long usage, general acquiescence, "and the absence of complaint can settle the interpre- "tation of the clause in question, then it should be "deemed as settled in conformity to the usage by the "courts" (5 How. at p. 607).

Fifty-one years ago this Court, in passing upon the question of State power to regulate ferries over boundary streams, reviewed the history of constitutional practice by the States and by Congress.

> "There has been now nearly three quarters of a cen- "tury of practical interpretation of the Constitution. "During all that time, as before the Constitution had its "birth, the States have exercised the power to establish "and regulate ferries; Congress never. We have "sought in vain for any act of Congress which involves "the exercise of this power."

This course of practice the Court considered a conclusive interpretation of the law.

Conway vs. Taylor's Executor, 1 Black 603;
Carroll vs. Campbell, 108 Mo. 550, 564–5.

It is none the less conclusive now that, under the decisions of this Court, the same constitutional practice has continued for an additional half-century. The theory, indeed, that a departure in practice and doctrine now exists,—the contention that the decisions of this Court and the actual administration of government have taken divergent paths in construing the Constitution,—must of necessity arise either from a misunderstanding of what the actual practice has been, or from a failure correctly to understand the decisions. In the present instance, the practice of States and Congress being clear, the difficulty must arise from a misunderstanding of the decisions. If the cases be read in connection with the subject-matter, and particularly if the expressions of the Court with relation, on the one hand, to Federal, and, on the other hand, to State, power, be distinguished, the whole line of decisions in this Court and State courts will be found in harmony with the practice of government. When the subject of the cases is not observed, and the references to State and Federal power are not distinguished, the result can only be confusion, of which an excellent example is found in an interpretation sometimes given to Mr. Justice Field's statement in the Gloucester Ferry case, 114 U. S. 196, 215–216, that:

> "In *Gibbons vs. Ogden* Chief Justice Marshall said "that laws respecting ferries, as well as inspection "laws, quarantine laws, health laws, and laws regulat-

"ing the internal commerce of the States, are compo-
"nent parts of an immense mass of legislation, embrac-
"ing everything within the limits of a State not
"surrendered to the general government; but in this
"language he plainly refers to ferries entirely within
"the State. . . ."

This statement, which is quoted on page 13 of the brief submitted on behalf of plaintiff in error, counsel apparently understand to mean that the Court in the Gloucester Ferry case interpreted Chief Justice Marshall as supporting State power only on intra-State streams. This would be a complete misunderstanding both of the Ferry case and of *Gibbons vs. Ogden,* and seems to place the Ferry case in direct opposition to the administration of government. A solution of the apparent contradiction will be found the means of reconciling all authorities on the subject.

The Origin of Federal Power over Ferries

Gibbons vs. Ogden raised the question of the validity of a law of New York giving to Livingston and Fulton and their assigns the exclusive right to operate steamboats upon the Hudson River between the States of New York and New Jersey. On behalf of Gibbons it was argued by Webster and Wirt that the Federal power over commerce is a unit, exclusive of State jurisdiction throughout its whole extent; that the New York law was a regulation of commerce within the exclusive jurisdiction of Congress, and therefore unconstitutional.

To this Emmett and Haines replied that Federal

power over commerce was not exclusive of, but concurrent with, State power; and that in the absence of legislation by Congress, State regulations were valid and effective. An instance of this concurrent State power is found, said Mr. Emmett, in the State laws regulating ferries upon boundary streams. He then cited a number of statutes of this character, including some of the New York laws regulating ferriage across Lake Champlain, to which we have already called attention. If these laws were valid, it was argued, there could be no escape from the conclusion that they were enacted under a concurrent State power.

Webster, in answer to this proposition, said that the argument to sustain the State law proved too much, for, said he,

> "Does it not admit the power of Congress, at once, "upon all these minor objects of legislation? If all "these be regulations of commerce, within the meaning "of the Constitution, then, certainly, Congress, having "a concurrent power to regulate commerce, may estab- "lish ferries, turnpikes, bridges, &c., and may provide "for all this detail of interior legislation. . . . The "truth was, he thought, that all these things were, in "their general character, rather regulations of police "than of commerce, in the constitutional understand- "ing of that term. . . . Generally speaking, roads and "bridges and ferries, though, of course, they affect "commerce and intercourse, do not obtain that impor- "tance and elevation as to be deemed commercial regu- "lations."

9 Wheat. pp. 18–20.

The subject which was under discussion then was the extent of the Federal power over commerce, and

Webster argued that Congress had no authority to regulate ferries upon boundary streams; that such regulation was a matter of police rather than of commerce and belonged entirely to the State. This is the argument to which Mr. Chief Justice Marshall assented. The term "police power" was one which at that time was characteristically descriptive of State jurisdiction. "And here," said Mr. Justice Catron, "is the limit between the sovereign power of the State and the Federal power. That is to say, that "which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States."

License Cases, 5 How. 504, 600;
Phillips vs. Mobile, 208 U. S. 472, 479.

That "immense mass of legislation" which the States had "not surrendered to the general government," included, according to Chief Justice Marshall, the power to make "laws respecting ferries," and in this expression the chief justice must be understood as referring solely to boundary streams. This, in fact, was the construction placed on the opinion, for over fifty years. (See remarks of Judge Samuel Nelson in 11 Wend. 586; *Chilvers vs. People,* 11 Mich. 27.) It needed no decision of this Court, in 1824, to affirm State power over intra-State ferries. On the other hand the case then at bar and the argument of counsel did in fact raise questions of State and Federal power over boundary streams, and the decision of the Court sustained State power upon such streams in relation to ferriage, quarantine, &c. Laws of this nature, it was held, should be deemed police regulations within

the exclusive jurisdiction of the State, a rule which was explicitly followed in many other cases.

In *Conway vs. Taylor's Executor,* 1 Black 603, a case decided in 1862, Mr. Justice Swayne discusses and follows Marshall's rule, quoting also the statement of the Court in *Fanning vs. Gregoire,* 16 How. 524, that Federal power over commerce does not "interfere with the police power of a State in granting ferry licenses." There are many other decisions which are equally clear in limiting Federal jurisdiction.

> "In the case of *Fanning vs. Gregoire,* 16 How. 524, "it was declared by this Court, speaking of the charter "of Fanning to ferry across the Mississippi River at "Dubuque, that the exercises of the commercial power "by Congress did not interfere with the police power "of the States in granting ferry licenses.
>
> "And in the case of *Conway vs. Taylor's Executor,* "1 Black 603, Mr. Justice Swayne, speaking for the "Court, in reference to a ferry established across the "Ohio River, between the States of Ohio and Ken- "tucky, declared that the power to establish and regu- "late ferries did not belong to Congress under the "power to regulate commerce, but belonged to the "States, and lay within the scope of that immense mass "of undelegated powers reserved by the Constitution "to the States."
>
> *Wiggins Ferry Co. vs. East St. Louis,* 107 U. S. 365, affirming 102 Ill. 560.

Many other cases may be found to the same effect. Thus in *People vs. Babcock,* 11 Wend. 586, Judge Samuel Nelson, later of this Court, in delivering the opinion of the New York Court of Errors, said (p. 591):

"I understand the case of *Gibbons vs. Ogden*, 9 "Wheat. 1, distinctly to concede that this power, which "belongs to the sovereignty of a State, and is essential "to the regulation of its internal police has not been "surrendered to the national government, and that the "clause in the constitution giving to Congress the power "'to regulate commerce with foreign nations, and "'among the several States, and with the Indian tribes' "does not include it. . . .

"Such power has never been claimed by Congress; "and, on the contrary, it has always been exercised by "the several States, between which a ferry is practicable "and convenient. There are numerous acts in our "statute book establishing ferries across the river in "question (Niagara); also across the St. Lawrence, "Lake Champlain, the river Hudson opposite New Jer-"sey, and Long Island Sound opposite Connecticut."

Ferry Company vs. United States, 5 Blatch. 198.

So the Supreme Court of New York, in 1882, speaking of a ferry from 129th Street in New York City to Fort Lee, New Jersey, said:

"The right to establish or regulate ferries is not "included in the power ceded to the general government "to regulate commerce . . . among the several States."

Mayor &c. vs. Longstreet, 64 How. Pr. 30;
Mills vs. County of St. Clair, 2 Gilm. (Ill.) 197, affirmed by U. S. Supreme Court, 8 How. 569;
Chilvers vs. People, 11 Mich. 43;
Marshall vs. Grimes, 41 Miss. 27;
Gould on Waters, Sec. 35.

The general rule was therefore established, by repeated and explicit decisions, that laws establishing or

regulating ferries, whether over intra-State or boundary streams, were not ordinarily to be regarded as regulations of commerce, but rather as regulations of police, and for this reason were within the exclusive jurisdiction of the State.

Notwithstanding the broad language in which this rule was announced, it would probably have been admitted even by Mr. Chief Justice Marshall, whose expressions denying Federal power over ferries were as strong as any found in the cases, that the rule might not be entirely without exceptions; and this was the express statement of Mr. Justice Swayne in *Conway vs. Taylor's Executor.*

> "Undoubtedly," he said, "the States in conferring "ferry rights, may pass laws so infringing the commer- "cial power of the nation that it would be the duty of "this Court to annul or control them (Wheeling Bridge "case, 13 How. 519). The function is one of extreme "delicacy and only to be performed where the infrac- "tion is clear" (1 Black 634).

It was perhaps to State statutes of this character that Mr. Justice Field referred in the Gloucester Ferry case, when, in quoting Mr. Chief Justice Marshall's remark that the power to pass laws respecting ferries was "not surrendered to the general government," he said that the Chief Justice "plainly refers to ferries entirely within the State." Mr. Justice Field, in other words, intended explicitly to deny that Congress is without power to regulate ferries over boundary streams, in case such legislation be desired. Even while taking this position he, however, expressly concedes that in the absence of Federal statute the whole subject belongs to the States. He says:

"From the earliest period in the history of the gov-
"ernment, the States have authorized and regulated fer-
"ries, not only over waters entirely within their limits,
"but over waters separating them; and it may be con-
"ceded that in many respects the States can more advan-
"tageously manage such inter-State ferries than the
"general government; and that the privilege of keeping
"a ferry, with the right to take toll for passengers and
"freight, is a franchise grantable by the State, to be
"exercised within such limits and under such regula-
"tions as may be required for the safety, comfort and
"convenience of the public" (114 U. S. at p. 217).

The result of the Gloucester Ferry case, therefore, with the other cases which have followed, has probably been so to extend the Federal authority over interstate ferriage as to bring the subject within the concurrent jurisdiction of Congress and of the States. It is a concurrent jurisdiction only, however, which has been established. In the absence of Federal legislation the States have all the power they have been accustomed to exercise. They no longer have the exclusive jurisdiction which they held for a century, but on the other hand neither has the former State dominion been abolished in favor of a new exclusive Federal authority.

State Jurisdiction to Regulate Ferries and Ferry Rates

The legal definition of a ferry and the nature and extent of State control are well stated by the Court of Errors and Appeals of New Jersey in its decision of 1853, upon the statute involved in the present case.

"When the act was passed, long before the invention "of steamboats, ferries were generally the property of "one or two individuals, established for the public con- "venience and private gain, by the owners of the shore, "sometimes by virtue of a grant or law, and sometimes "without any public authority. The owner or keeper "resided on the one bank or the other of the river over "which the ferry passed, and kept his boats and other "apparatus where he resided. The ferry was com- "monly known and designated by the name of the place "from which it started, and where such owner resided, "as Paulus Hook ferry; or from the name of the owner "or keeper, as Dunk's ferry, Corriel's ferry, &c. In "many cases, where the river was not too wide, a bell "or horn, or some other signal was established on the "side of the river opposite to that where the owner "lived, so that persons coming there who desired to "pass over, could make known their wishes. Probably "but few, if any of the keepers, had a boat constantly "running, or started at any particular hour. In some "cases, there were ferry owners on both sides of the "river; but the ferry or ferries on each side were con- "sidered and spoken of as distinct ferries, and had dis- "tinct owners or keepers. This was the case with most, "if not all, the ferries between Philadelphia and what "is now called Camden; and the ferries on each side "were regulated and governed by the laws of the State "in which such owner or keeper resided. Sail and row "boats, and flats or scows, were the vessels in use, as is "manifest from the act itself."

Freeholders of Hudson County vs. State, 24 N. J. L. 718, 721–2.

Under this definition, a ferry had a fixed situs. It was not regarded as though located partly upon land and partly on the water, but, strictly speaking, re-

ferred to a certain point of departure, and consisted in the right of transporting passengers from that point. "The point of departure is the seat, the base, the home of the ferry" (*State vs. Faudre,* 54 W. Va. 122). This appears in many statutes, of which one of the earliest in this country is the Massachusetts Act of 1641, copied in the Laws 1792–1800, p. 965, ordering

> "That whosoever hath a ferry granted upon any pas-
> "sage shall have the sole liberty of transporting pas-
> "sengers from the place where such ferry is granted to
> "any other place where ferryboates use to land; and
> "any ferryboates that shall land passengers at any
> "other ferry may not take passengers from thence, if
> "the ferryboates of that place be ready."

A modern parallel of this statute may be found in the existing Code of West Virginia, which orders that

> "Any person being the owner or occupier of a ferry
> "on the shore of another State opposite to or within
> "two miles of a ferry established under the laws of this
> "State . . who shall ferry from . . this State . . to
> "the shore of such other State . . shall for every such
> "offence forfeit . . ten dollars" (Chap. 44, Sec. 15).

The subject being left within each State, entirely to local regulation, every stream separating counties or towns may present the same questions which arise upon State boundaries; but there can be no conflict of laws, for every ferry is within a single jurisdiction. Thus when the City of Hudson and the village of Athens, on opposite banks of the Hudson River in New York State, each established a monopoly of ferriage at the same point in the river, the New York courts sustained both grants, and held that each municipality could regulate ferriage from its own shore.

Power vs. Village of Athens, 26 Hun 282; affirmed in 99 N. Y. 592.

The same decision was rendered by this Court in the case of grants of monopolies of ferriage by different States on opposite sides of the Ohio River.

Conway vs. Taylor's Executor, 1 Black 603.

So the Supreme Court of Tennessee, considering the question whether that State could establish a ferry on the East bank of the Mississippi River, and compel performance by the keeper of his legal duties of ferriage, applied to the inter-State stream the laws which govern ferriage across county lines.

> "That we have no jurisdiction to punish for a re-
> "fusal to transport from the other side of the river
> "to ours, is true; yet if the right of landing on the
> "other bank is a perfect right, subject to be enforced
> "by the ferry keeper, and he undertakes to carry, there
> "is no reason why he should not be punished for refus-
> "ing to transport passengers from the east to the west
> "bank. The same principle is acted upon in cases
> "where the Holston and other large rivers form county
> "lines, and a ferry is granted by the county court on
> "its own bank; and so where the soil over which the
> "road lies on the opposite bank is owned by different
> "persons: there each owner has granted licenses to
> "transport from his own bank, with liberty to land on
> "the other."

Memphis vs. Overton, 3 Yerg. 387, 390.

To the same effect is the recent decision in West Virginia holding that a ferryboat derives its right of departure from State law.

"Under its franchise the boat can depart, and, the "stream being a highway, it can navigate its waters, and "can land on the opposite shore. . . . It cannot land on "private property without consent, but it has a right "to land at a public wharf, paying reasonable wharf-"age. In carrying persons and property it is engaged "in interstate commerce, and its landing could not be "prohibited or taxed. . . ."

State vs. Faudre, 54 W. Va. 122, 123.

The right to leave a State comes from State law,[1] and though a State may not withdraw this permission, the subject is not wholly beyond its jurisdiction.

This accords with fundamental legal principles. At common law the carrier's duty to receive, carry, and deliver arose from the law of the State where the transportation originated.

Crouch vs. London & N. W. Railway, 14 C. B. 255;

Smith vs. Alabama, 124 U. S. 465, 477;

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[1] In many instances State constitutions guaranteed the right of emigration, for example:

Indiana, Constitution of 1816, Art. 1, Sec. 23; 1851, Art. 1, Sec. 36. Kansas, Constitution of 1857, Art. XV, Sec. 22. Kentucky, Constitution of 1792, Art. XII; 1799, Art. X, Sec. 27; 1850, Art. XIII, Sec. 29. Missouri, Constitution of 1820, Art. XIII, Sec. 21. Oregon, Constitution of 1857, Art. 1, Sec. 31. Pennsylvania, Constitution of 1776, Art. XV; 1790, Art. IX, Sec. 25; 1838, Art. IX, Sec. 25; 1873, Art. 1, Sec. 25. Vermont, Constitution of 1777, Ch. 1, Art. XVII; 1786, Ch. 1, Art. XXI; 1793, Ch. 1, Art. XIX.

Transportation out of the State as a punishment for crime was forbidden by Illinois Constitution of 1818, Art. VIII, Sec. 17. Arkansas, Constitution of 1836, Art. 1, Sec. 10. Ohio, Constitution of 1802, Art. VIII, Sec. 17. Vermont, Constitution of 1793, Chap. 1, Art. XXI. Mississippi forbade exile of any free white citizen, Constitution of 1832, Art. 1, Sec. 27.

Federal Common Law and Interstate Carriers, 9 Col. Law Rev. 375;
Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 23–37; 124–130.

It is probably true that there is a right to engage in commerce among the States, which originates in the Federal Constitution, but, if so, it is a very recent development of constitutional law, so uncertain in extent and application that it is rarely or never mentioned without dissent. In *Crutcher vs. Kentucky*, 141 U. S. 47, the new theory was advanced by six members of the court; in *Telegraph Co. vs. Kansas*, 216 U. S. 1, by four justices only; in *Textbook Co. vs. Pigg*, 217 U. S. 91, by seven justices; in *Oklahoma vs. Gas. Co.*, 221 U. S. 229, by six justices. In none of the cases was the new doctrine necessary to support the conclusions reached, and all the cases rest finally upon the old doctrines developed from *Gibbons vs. Ogden*, where Mr. Chief Justice Marshall stated that "the Constitution does not confer the right of intercourse between State and State" (9 Wheat. at p. 211).

Whether there be such a Federal right or not, it is clear that the historic right to engage in interstate commerce is derived from State law. This is conspicuously true of common carriers, for here a great body of law has been built on the fundamental duty of the carrier to receive, carry and deliver, a duty which before the adoption of the Interstate Commerce Act originated in State law alone.

Bowman vs. Chicago &c. Railway, 115 U. S. 611, 615;

See, also, the history of the Federal statute of 1866, given later (pp. 70-72) in this brief, and the debate on bill in the Senate.

Federal authority in this field has been hesitatingly exercised, and directed only to the correction of specific evils. Statutes enacted for these purposes have altered the existing body of law in certain particulars, but no further. In all other respects carriers are still subject to State law.

Vermilye vs. Telegraph Co., 207 Mass. 401.

The duty to furnish ordinary freight cars, for example, comes from Federal statute, but the duty to furnish refrigerator cars, if it exist, arises from State law.

Re Transportation of Fruit, 10 Int. Com. Rep. 360.

So, although a State may not regulate interstate freight rates, it may in some respects determine the services which shall be rendered for a rate fixed by the carrier or regulated by the Commission.

Pennsylvania R.R. vs. Hughes, 191 U. S. 477.

Moreover, the Federal statutes relate to transportation by rail. Carriers not within these statutes, for example, those transporting by boat on different rivers, or by horse and wagon, are still subject to the unquestioned powers of the State.

The Interstate Commerce Act has no application to ferries, and it is therefore held in the most recent cases upon the subject, that a Kentucky franchise to maintain a ferry across the Ohio River gives the right of ferriage from the Kentucky shore only; that the right of ferriage from the Indiana shore is an Indiana franchise, and that

"the franchise granted by Indiana to maintain the ferry "from the Indiana shore is wholly distinct from the "franchise obtained from Kentucky to maintain the "ferry from the Kentucky shore. . . ."

Louisville &c. Ferry Co. vs. Kentucky (1902), 188 U. S. 385, 394, citing *Conway vs. Taylor's Executor,* 1 Black 603;

Newport vs. Taylor's Executor, 16 B. Mon. 699, 786.

A ferry franchise granted by Kentucky law, said Mr. Justice Swayne,

"is confined to transit from the shore of the State. "The same rights which Kentucky claims for herself "she concedes to others. She has thrown no obstacle "in the way of the transit from the States lying upon the "other side of the Ohio and Mississippi. She has left "that to be wholly regulated by their ferry laws. We "have heard of no hostile legislation, and of no com- "plaints, by any of these States. It was shown in the "argument at bar that similar laws exist in most, if not "all, the States bordering upon these streams. They "exist in other States of the Union bounded by navi- "gable waters.

"Very few adjudged cases have been brought to our "notice in which the ferry rights they authorize to be "granted have been challenged; none in which they "have been held to be invalid."

Conway vs. Taylor's Executor, 1 Black 603, 631.

All the cases announcing the rule of the first century under the Constitution, by which the regulation of ferries was placed among the powers "not surrendered to the general government," have, either by implication or more often expressly, announced the cor-

relative doctrine that the entire subject was within the exclusive control of the States. This has also been held in many cases where the subject of Federal powers was not considered.

Hatten vs. Turman (1907), 123 Ky. 844;
Parsons vs. Hunt (1905), 98 Tex. 420;
State vs. Faudre (1903), 54 W. Va. 132;
Ferry Co. vs. Russell (1902), 52 W. Va. 356;
State vs. Sickmann (1896), 65 Mo. App. 499;
Nixon vs. Reid (1896) 8 So. Dak. 507;
Carroll vs. Campbell (1891), 108 Mo. 550;
Tugwell vs. Eagle Pass Ferry Co. (1889), 74 Tex. 480;
Burlington &c. Ferry Co. vs. Davis (1878), 48 Iowa 133;
Bridge Co. vs. Geisse (1875), 38 N. J. L. 39;
Challiss vs. Davis (1874), 56 Mo. 25;
Cross vs. Hopkins (1873), 6 W. Va. 323;
Gear vs. Bullerdike (1864), 34 Ill. 74;
Phillips vs. Bloomington (1848), 1 Greene (Iowa) 498, 502;
Bowman vs. Walthen (1841), 2 McLean 370;
Midland Ferry Co. vs. Wilson, 28 N. J. Eq. 537.

Even the Gloucester Ferry case, the first decision which indicated that the Court would incline to support Congressional legislation upon the subject, concedes, both as to intra-State and boundary streams, that,

> "the privilege of keeping a ferry with the right to "take toll . . . is grantable by the State, to be exer- "cised within such limits and under such regulations "as may be required for the safety, comfort and con- "venience of the public" (114 U. S. 196, 217).

As was said by Mr. Chief Justice Fuller and Justices Field, Gray and White in their separate opinion in the Covington Bridge case:

> "The several States have the power to establish and "regulate ferries and bridges, and the rates of toll "thereon, whether within one State, or between two "adjoining States, subject to the paramount authority "of Congress over interstate commerce."
>
> *Covington &c. Bridge Co. vs. Kentucky,* 154 U. S. 223.

This rule, which is supported by the unbroken course of history and by a long line of decisions in this Court, is questioned by no single authority, prior to the decision in the International Transit Co. case rendered by the District Court in Michigan, March 14, 1912, unless a literal interpretation which was expressly disavowed in rendering judgment, be placed upon broad phrases in the argument of the five justices forming a majority of the Court in the Covington Bridge case, 154 U. S. 204. The State law there involved was undoubtedly beyond State jurisdiction, for, as Mr. Justice Brown said, in delivering the majority opinion:

> "It is clear that the State of Kentucky, by the statute "in question, attempts to reach out and secure for itself "a right to prescribe a rate of toll applicable not only "to persons crossing from Kentucky to Ohio, but from "Ohio to Kentucky, a right which practically nullifies "the corresponding right of Ohio to fix tolls from her "own State" (p. 220).

This was sufficient to dispose of the case, and did in fact dispose of the case. The majority opinion

holds the State statute invalid because it sought to execute an extra-territorial jurisdiction. On the other hand the nature of intra-territorial jurisdiction was not affected. The right of each State to regulate rates for passage from its own shores was not touched, and—although Ohio and Kentucky could exercise by joint action only the sum of their powers over the commerce of each State, and could by no means increase their powers over interstate commerce, nevertheless, since the bridge had been built by joint action of the two States and it was possible that the power of separate action was lost or impaired—the opinion expressly reserves decision upon the subject of State regulation of rates by joint action. Mr. Justice Brown said:

> "We do not wish to be understood as saying that, in "the absence of Congressional legislation, or mutual "legislation of the two States, the Company has the "right to fix tolls at its own discretion. . . . Nor are "we to be understood as passing upon the question "whether, in the absence of legislation by Congress, the "States may, by reciprocal action fix upon a tariff "which shall be operative upon both sides of the river.
>
> "We do hold, however, that the statute of the Com- "monwealth of Kentucky in question in this case, is an "attempted regulation of commerce which it is not "within the power of the State to make" (p. 222).

There seems, then, to be no doubt as to the exact point in judgment. The opinion holds that Kentucky cannot regulate rates charged for passage from Ohio.

It must be admitted that in the argument by which the opinion approaches this judgment, there are many expressions which seem inconsistent with the conclusion actually announced. The statement, for exam-

ple, that "Congress, and Congress alone, possesses the requisite power . . . to enact a uniform scale of charges which will be operative in both directions" (p. 221), if understood to assert an exclusive Federal jurisdiction, such as counsel for plaintiff in error seek to support in the case at bar, would directly contradict the statement "Nor are we to be understood as passing upon the question whether in the absence of legislation by Congress, the States may, by reciprocal action, fix upon a tariff which shall be operative upon both sides of the river" (p. 222). It is probable, therefore, that the statement in question meant merely to assert, as indeed is necessarily true, that Congress is the only single authority which can legislate upon the whole subject. The opinion well illustrates the soundness of Mr. Chief Justice Taney's statement, that the text of an opinion must be limited by the case which the Court had under consideration.

> "It is not my purpose," he said, "to enter into a "particular examination of the various passages in dif- "ferent opinions of the Court, or of some of its mem- "bers in former cases . . . And I am the less inclined to "do so, because I think these controversies often arise "from looking to detached passages in the opinions, "where general expressions are sometimes used, which, "taken by themselves, are susceptible of a construction "that the Court never intended should be given to "them, and which, in some instances, would render dif- "ferent portions of the opinion inconsistent with each "other. It is only by looking to the case under con- "sideration at the time, and taking the whole opinion "together, in all its bearings, that we can correctly un- "derstand the judgment of the Court."
>
> License Cases, 5 How. 504, 573.

It would not be easy to find a better illustration of the necessity of this rule than appears in two expressions of the majority opinion in the Covington Bridge case. Mr. Justice Brown says:

> "It is true the States have assumed the right in "a number of instances . . . to fix the rates or tolls "upon interstate ferries and bridges, and perhaps in "some instances have been recognized as having the "authority to do so by the courts of the several States. "But we are not aware of any case in this Court where "such right has been recognized" (154 U. S. p. 219).

If this expression be limited in its application to the statute under consideration, it is unquestionably correct. No decision supports a claim that Kentucky may regulate rates for crossing from the Ohio shore, and other sentences in the opinion indicate that this limitation may have been intended. Mr. Justice Brown said, for example:

> "It is obvious that the bridge could not have been "built without the consent of Ohio, since the north end "of the bridge and its abutments rest upon Ohio soil; "and without authority from that State to exercise the "right of eminent domain, no land could have been "acquired for that purpose. It follows that, if the State "of Kentucky has the right to regulate the travel upon "such bridge and fix the tolls, the State of Ohio has the "same right, and so long as their action is harmonious "there may be no room for friction between the States; "but it would scarcely be consonant with good sense to "say that separate regulations and separate tariffs may "be adopted by each State (if the subject be one for "State regulation), and made applicable to that portion "of the bridge within its own territory" (pp. 220–221).

If, on the other hand, Mr. Justice Brown's statement be understood, going beyond the case in hand, to mean that State regulation of ferry rates from the shore of the regulating State has never been sustained by this Court, the error of interpretation becomes manifest, for—

1. Every case which held that the entire subject of ferriage was beyond Federal power and "within the scope of that immense mass of undelegated powers reserved by the Constitution to the States" (*Wiggins Ferry Co. vs. East St. Louis,* 107 U. S. 365), necessarily held that the entire subject was within State power.

2. State authority to regulate these rates was explicitly recognized in the Gloucester Ferry case, 114 U. S., where Mr. Justice Field, speaking for a unanimous court, and expressly referring to ferries over boundary as well as intra-State streams said that

> "the right to take toll is grantable by the State, to be "exercised within such limits and under such regula- "tions as may be required," &c. (p. 217).

Mr. Justice Brown further makes the suggestion that—

> "The opinion," of this Court in *Conway vs. Taylor's Executor,* 1 Black 603, "did not pass upon the ques- "tion of the right of one State to regulate the charge "for ferriage, nor does it follow that because a State "may authorize a ferry or bridge from its own terri- "tory to that of another State, it may regulate the "charges upon such bridge or ferry" (154 U. S. p. 219).

In the Covington Bridge case, Kentucky sought to regulate all the charges upon the bridge,—plainly in

excess of its authority. If, therefore, Mr. Justice Brown's statement be applied to the case with which he was dealing, his proposition is sound,—it does not follow because part of a bridge is within State jurisdiction that the State may regulate all bridge tolls. It must be noted, however, that in *Conway vs. Taylor's Executors,* this Court did, in fact, cite the case of *Freeholders of Hudson County vs. State,* 24 N. J. L. 718, as an authority supporting the view which the Court then announced. Moreover, ferry franchises are commonly monopolies, and the terms on which these franchises are given appear in the State statutes. The ferry license which the States grant is not an exclusive right of ferriage without reference to rates, nor is it a license to transport at any rates the ferryman may be able to enforce. State ferry licenses, as already suggested (*ante,* p. 34), are generally monopolies of ferriage at rates fixed by statute or subject to determination by local authorities, and this limitation upon rates is part of the license.

Mr. Justice Brown appears to admit State jurisdiction to license ferries, but as Mr. Justice McLean remarked, 5 How. 590, a right to license implies the right to exclude those not licensed. Is then the prohibition of ferriage, except to holders of State permission, valid, while regulation of tolls is unconstitutional as a more direct regulation of interstate commerce? The New Jersey Court of Errors well remarked in deciding the case at bar, that—

> "No distinction is suggested between the exaction "of a license and the fixing of tolls, so far as concerns "the power to regulate commerce."
>
> *New York Central R. Co. vs. Board,* 76 N. J. L. 664.

> "In regard to ferries . . . there is a still further "right, which the public may exercise, to wit: the right "of regulating the rates of ferriage. . . . It seems to "me, that the grantees of ferries or ferry rights, must "be deemed to accept them subject to these implied "conditions."
>
> *People vs. Mayor &c. of New York,* 32 Barb. 102, 112.

This view is supported by the statement already quoted from Mr. Justice Field's opinion in the Gloucester Ferry case, 114 U. S. 196, 217.

Broad then as are some statements in the Covington Bridge case, they must be limited to the facts before the Court. It was decided that Kentucky could not regulate all tolls upon the bridge, but the majority opinion does not pass "upon the question whether, in the absence of legislation by Congress, the States may, by *reciprocal* action, fix upon a tariff which shall be operative upon both sides of the river" (154 U. S. p. 222). It is this reciprocal action which is contemplated by the resolutions now before the Court. New Jersey asserts only the right which she recognizes as belonging to the State of New York, and four members of this Court, in their separate opinion in the Covington case, expressly sustain this right.

This review of the cases then shows—

That a long line of decisions by this Court, including *Fanning vs. Gregoire* and *Conway vs. Taylor's Executor,* in harmony with the legislative practice of the States and of Congress and the universal customs and habits of the country, recognize

the rule that in the absence of Federal legislation, the entire subject of ferry regulation belongs to the States,—each State regulating transportation from its shore.

That this rule was reaffirmed by four members of this Court in the Covington Bridge case in 1893, and that the point to which the majority opinion in that case limited their judgment was in harmony with the existing rule.

Up to 1893, therefore, the rule of State jurisdiction was part of the Constitution. It may be doubted whether Congress itself can well change this rule. If the State of Vermont, as its statute recites,

> "found by experience that great advantage has been "taken by ferrymen demanding unreasonable prices ". . . and this Assembly cannot so well distinguish be- "tween the several rivers and the several parts of said "rivers, ponds or lakes on account of distance, swift- "ness of water, number of travellers, &c."

and, therefore, turned the subject over to the authorities of the different towns throughout the State,

Laws of 1787, p. 70,

a practice which Vermont has ever since followed, and which has its counterpart in every other State, it is not likely that Congress can successfully perform for the nation what State legislatures are unable to do within their narrow boundaries. Certainly the practice of the nation has continued since the decision of the Covington Bridge case to follow the rule which had been unquestioned law before that case. The

practical construction of that decision, as shown in the creation and regulation of ferries by State law throughout the country, is unmistakable.

That this Court does not understand the Covington Bridge case to overrule the previous cases, appears from two subsequent decisions, *Williams vs. Wingo*, 177 U. S. 601, and *Louisville Ferry Co. vs. Kentucky*, 188 U. S. 385, the first of these cases decided six years and the second ten years later than the Covington Bridge case.

In *Williams vs. Wingo* this Court, after stating the substance of *Fanning vs. Gregoire*, including the fact that the stream there dealt with formed a State boundary, held that that case was "in point and decisive" (177 U. S. at p. 603) of a similar question arising upon an intra-State stream. Had *Fanning vs. Gregoire* been wrong as to the only class of streams with which it dealt, and had its doctrine been right only as applied by analogy to a class of streams not in that case under discussion, the Court could not have found the case "in point" or have followed the decision.

In *Louisville Ferry Co. vs. Kentucky* this Court (188 U. S. at p. 394) cited and approved the case of *Conway vs. Taylor's Executor*. It is true that in *St. Clair County vs. Interstate Transfer Co.*, 192 U. S. 454, decided in 1904, this Court said:

> "Because we have *arguendo* rested our conclusion in "this case upon the assumption that the respective "States have the power to regulate ferries over navi- "gable rivers constituting boundaries between States, "we must not be understood as deciding that that doc- "trine which undoubtedly finds support in the opinions

"announced in *Fanning vs. Gregoire* and *Conway vs. "Taylor's Executor* has not been modified by the rule "subsequently laid down in the Gloucester Ferry case "and the Covington Bridge case. As the case has not "required us to enter into those considerations we have "not done so" (p. 470).

But the cases of *Fanning vs. Gregoire* and *Conway vs. Taylor's Executor* had both been very recently approved and followed, and the Gloucester Ferry case expressly states that

"the privilege of keeping a ferry with the right to take "toll . . . is grantable by the State, to be exercised "within such limits and under such regulations as may "be required for the safety, comfort and convenience "of the public" (p. 217).

There is nothing, then, in the most recent cases which disturbs the rule so well settled by previous decisions and by long-continued practice—indeed the fact that this Court, when rendering in the St. Clair case the decision which holds State jurisdiction inapplicable to a car transfer such as was then under consideration, based its judgment upon a distinction between such a transfer and an ordinary ferry, indicated that when the question arose the old rule would be reaffirmed.

5. *The second resolution of the board of freeholders regulating rates for the round trip starting from the New Jersey side, is within State jurisdiction.*

Such regulation has been sustained in a recent and well-reasoned case.

State vs. Sickmann, 65 Mo. App. 499.

Legislation of this character by each State produces no conflict, for each State asserts only the rights which are conceded to other States.

Moreover carriers are accustomed to treat a round trip as different from two separate trips in opposite directions. The round trip may, therefore, well be regarded, so far as the price is concerned, as a single service to be regulated by the State of first departure.

C. THERE IS NO FEDERAL STATUTE WHICH SUPERSEDES STATE JURISDICTION TO REGULATE FERRIES.

I

The Interstate Commerce Act is not involved.

The ferry rates which New Jersey regulates are not within the operation of the Interstate Commerce Act.

Plaintiff in error, operating under a New Jersey license, is engaged not only in ferriage connected with railroad transportation, but also in a local ferry business across the Hudson River. It is this local business and the ferry rates which are "disconnected from the railroad transportation" which New Jersey regulates. The distinction between ordinary ferriage and transportation of railroad passengers and freight is well recognized.

St. Clair County vs. Interstate Transfer Co., 192 U. S. 454.

So where a railroad transfer extends its operation to engage in ordinary ferriage, a State license is necessary.

Act of Missouri, March 3, 1857, p. 157.

The Interstate Commerce Act applies to carriers transporting passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control for continuous shipment from one State to another; and for the purpose of bringing all rates for such transportation within the Federal rule, the Act provides that

> "The term railroad as used in this act shall include "all bridges and ferries used or operated in connection "with any railroad, and also all the road in use by any "corporation operating a railroad, whether owned or "operated under a contract, agreement, or lease; and "the term transportation shall include all instrumentali-"ties of shipment or carriage."

Now it is plain that as to part of its business the ferry of plaintiff in error is "operated in connection with a railroad." It is plain that part of its business has no connection with a railroad at all. If this local business be not subject to State control, it is subject to no control, for it is not within the terms of the Act. This is the rule for which plaintiff in error contends, and the argument turns upon the word "*ferry*" as used in the provisions of the statute above quoted. If the "ferry," i.e., the ferry-boats, are "operated in connection with any railroad," it follows, so plaintiff in error argues, that State jurisdiction over the "ferry," —that is over all ferry service, whether or not within the scope of the Act,—is excluded. Upon this theory

the ferry rates for transportation wholly by water have been filed with the Commission, notwithstanding the fact that the Act relates only to "transportation wholly by railroad or partly by railroad and partly by water, when both are used under a common control."

If this be sound legal construction, plaintiff in error should also file with the Commission all its intra-State rates, for "railroads" are no less within the Act than "ferries." When this shall have been done, State jurisdiction over its domestic commerce will be ousted, notwithstanding that the Act relates only to shipment from State to State, and that the Commission can no more regulate intra-State rates, than it can regulate ferry rates "disconnected from the railroad transportation."

> "Manifestly," this Court recently said, "the mere "fact that the charter of the road contemplated that it "should be projected into several States, did not change "the nature and character of our constitutional system, "and therefore did not destroy the power of Kansas "over its domestic commerce, or operate to bring under "the sway of the United States, matters of local con- "cern. . . ."
>
> *Missouri Pacific Railway Co. vs. Kansas*, 216 U. S. 283.

It was very recently held by the Commerce Court that although a carrier by water which joins with railroads as to some traffic is, with respect to that traffic, subject to control and regulation by the Interstate Commerce Commission, nevertheless the power of the Commission "does not extend to the other port-to-

port business of the company, whether interstate or intra-State."

Goodrich Transit Co. vs. Interstate Commerce Commission, 190 Fed. 943.

This proposition is supported by the recent decision of this Court in the same case, for, although the decision of the Commerce Court was reversed, the ground of the reversal was that the action of the Interstate Commerce Commission under consideration was not such as amounted to a regulation of the port-to-port business,—or, in the words of Mr. Justice Day, "the requiring of information concerning a business is not regulation of that business."

Interstate Com. Commission vs. Transit Co., 32 Sup. Ct. Rep. 416, 440.

Upon the fundamental rule that the Commission cannot regulate water rates "disconnected from railroad transportation," all courts agree. On this rule, indeed, doubt has never existed; for it is plain that if all vessels which carry railroad freight are for this reason as to all their business subject to the Interstate Commerce Act for purposes of regulation, or, whether within the Act or not, are by it protected from all State regulation even as to port-to-port business, we must soon see a revolution in the conditions of navigation. Water transportation "disconnected from railroad transportation" was, for good reasons which are fully disclosed in the Congressional debates, left outside the operation of the Act. Now, according to plaintiff in error, all this must be changed because transportation wholly by water must be deemed within

a statute which relates to transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common control for continuous shipment from one State to another.

Upon this foundation, and the fact that plaintiff in error has filed with the Interstate Commerce Commission a copy of its tariff for ferriage from Hoboken to 42d Street, counsel argue:

> "By the requirement of the Act of Congress of the "filing of this tariff, and the filing of the tariff in obedi- "ence thereto, the tariff became a law governing the "transportation precisely as if the tariff had been "enacted by Congress in the same words and figures."
>
> Brief for plaintiff in error p. 19.

The correctness of this rule as applied to railroads is undoubted, but counsel seek to apply it to the port-to-port traffic of ferries. No case supports such an application of the rule, and the recent decision of this Court follows the plain reading of the statute, which leaves transportation wholly by water precisely where it was before the Act was passed.

II

The Federal statutes in regard to enrollment and inspection of vessel, licensing officers, etc., are not involved.

In *Conway vs. Taylor's Executor*, 1 Black 603, it was shown that the vessels enjoined were enrolled and licensed under the laws of the United States. They were entitled, therefore, the Court said, to "the prosecution of the carrying and coasting trade, and of ordi-

nary commercial navigation," but it was added this gives no authority to "invade the ferry franchise of another, without authority from the holder." A similar decision was rendered in *Carroll vs. Campbell*, 108 Mo. 550, where the Court said:

> "Let it be admitted, then, that the defendants are "engaged in the carrying trade on the Mississippi "River, and their vessel duly officered and licensed; "does this give them the right of ferry which they "claim, and which they admit they exercised? We "think not. The question mooted in this case is not "new. It has been met and decided by the Supreme "Court of the United States time and again; and it is "with great satisfaction that one reads the opinions of "that court, and observes with what clearness the juris-"diction of the States and federal government are "defined. . . .
>
> "In the case of *Conway vs. Taylor's Executor*, the "question raised by respondents was examined by Mr. "Justice Swayne. . . . It was urged in that case, just "as in this, that the Commodore having been enrolled "under the laws of the United States, the injunction "violated the rights which the enrollment and license "gave her in respect to trade, by obstructing the free "navigation of the Ohio. The Court held that the "decree only enjoined the Commodore from interfering "with the ferry privileges; that it was not intended to "exclude or restrain defendants from prosecuting the "ordinary business of commerce" (pp. 562–563).

A long line of authorities holds that the Federal statutes referred to, give no authority to maintain a ferry.

Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, affirming 102 Ill. 560;

People vs. Babcock, 11 Wend. 586; opinion by Judge Samuel Nelson;
Mayor vs. Starin, 106 N. Y. 1;
Mayor &c. vs. Longstreet, 64 How. Pr. 30;
Midland &c. Ferry Co. vs. Wilson, 28 N. J. Eq. 537;
Carroll vs. Campbell, 108 Mo. 550, 562–3;
Marshall vs. Grimes, 41 Miss. 27;
Chilvers vs. People, 11 Mich. 43.

The statutes have been in existence many years, and during all this time State ferry rates throughout the country have been regulated by State law. No suggestion can be found in the decision of any court that this practice contravenes these statutes,—if it does, the States are now and long have been without authority to regulate even intra-State ferries, for the Federal statutes cover all navigable waters of the United States and include within their operation all boats navigating such waters, whether crossing State lines or not.

III

The Federal statute of 1866 is not involved.

The statute authorizes every railway company whose road is operated by steam to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from State to State, to receive compensation therefor and to connect with roads of other States (R. S., Sec. 5258). The statute has been

in existence forty-six years and has never been given the effect for which plaintiff in error contends. Moreover, the statute, like the Interstate Commerce Act, is plainly a railroad statute, relating to transportation wholly by railroad, or partly by rail and partly by water when both are used together. The history of this statute, which is not without interest, shows its purpose.

Federal Power over Carriers and Corporations, pp. 95, 209.

In 1833 the State of New Jersey granted to the Camden & Amboy Railroad Company a monopoly of transportation between New York and Philadelphia.

Acts of New Jersey, 1829–1830, 83;
Harrison Comp. N. J. Laws (1833) 284.

This grant was sustained in the State courts.

Camden & Amboy Railroad Cases (1862), 15 N. J. Eq. 13; (1863), 16 *id.* 321; (1867) 18 *id.* 546.

In 1861 it was found that this company was unable to meet the demands for transportation of troops and supplies, and a government quartermaster impressed another railroad, and sent over it some eighteen thousand men and four hundred tons of freight. For this transportation the Camden & Amboy Company recovered damages in a suit against the railroad so impressed.

This monopoly roused wide public interest and opposition at a very critical period but there was no suggestion that it was illegal. The right to receive,

carry and deliver comes from State law; the right to leave a State comes from State law, and the right to carry passengers out of the State of New Jersey to Philadelphia in one direction, or to New York in the other, had not been granted by New Jersey to rivals of the Camden & Amboy Company. The result was the passage of a Federal statute, giving all railroads operated by steam the right to carry goods and passengers from State to State.

> Act of June 15, 1866, U. S. Rev. Stat., Sec. 5258; See Speech of Senator Sumner, Feb. 14, 1865, Cong. Globe 38 Cong. 2d Sess. 793; Senator Chandler, May 29, 1866, Cong. Globe 39 Cong. 1st Sess. 2870; Senator Foot, Jan. 15, 1866; *id.* 227. Remarks of James A. Garfield, Cong. Rec. 45 Cong. 2d Sess., Vol. 7, Part 4, p. 3406.

This is an instance, therefore, of a Federal franchise to engage in interstate commerce, such as was discussed in *Oklahoma vs. Gas Co.*, 221 U. S. 229, and other cases which we have mentioned. This franchise, however, was created by statute without which it did not exist. The statute has no relation to the local business of ferries, and was not intended to supersede, and has not in fact superseded, the system of ferry regulation which has existed from colonial days to the present time.

II

The rates established by the Board of Freeholders are not invalid as taking the property of plaintiff in error without compensation.

The record states that

> "The primary purpose of said ferries, and the operation thereof, is the accommodation of the patrons of said railroad, and the general passenger, mail, express, baggage and freight service thereof" (p. 80).

The record further states that, except as to a few stations, no charge was made to railway passengers for the ferry service (Rec. p. 30). This includes, then, the handling of passengers' baggage. Whether any charge was made by the ferry to the railroad for handling its mail, express and freight business does not appear.

Under these circumstances it is not surprising that the ferry should have been operated at a loss. The railroad could hardly expect that the local ferry service would pay the expenses of maintaining the terminal of a great railway system.

The record contains, furthermore, no showing which would enable the Court to ascertain the cost of maintaining the local ferry service, nor is there any evidence upon which a theory of apportionment as between the local ferriage and the railway terminal business can be based.

Of course losses from interstate business cannot be charged against the income of the Company in ascertaining the reasonableness of domestic rates.

Smyth vs. Ames, 169 U. S. 466;

Chicago &c. Ry. Co. vs. Thompkins, 176 U. S. 167;
Minneapolis &c. Ry. Co. vs. Minnesota, 186 U. S. 257;
San Diego &c. Ry. vs. City, 174 U. S. 739;
State vs. Seaboard Air Line, 37 So. Rep. 314.

Since, therefore, the expense of maintaining the local ferry service is not shown in the record before the Court, there is no ground upon which to rest an argument that the rates fixed by the Freeholders are unreasonably low, and no argument is in fact presented in the brief submitted on behalf of plaintiff in error. The presumption is that the rates fixed by the Freeholders were reasonable.

Minneapolis &c. Railroad vs. Minnesota, 186 U. S. 257.

The record affirmatively shows in support of this presumption that the charges for ferry services made to passengers on the street railway having its terminus in Hoboken were "on one-way passengers two and a half cents, and on round trip passengers five cents" (Rec. p. 31). These rates were maintained until September 30, 1905. The amount charged after that date does not very clearly appear.

To passengers coming from the New York, Ontario & Western Railway the ferry charge was three cents for a single trip,—presumably including in this figure all services connected with the handling and delivery of baggage.

With this statement, the charge that the action of New Jersey in establishing a three-cent rate for foot passengers without baggage was unreasonable may well be dropped.

Equality is emphatically equity in such a case as this. Certainly a common carrier which has established a two-and-a-half-cent rate for some foot passengers cannot complain of confiscation if the State establish a three-cent rate for other foot passengers.

There is no doubt that the alteration in ferry rates at the 42d Street ferry must greatly have increased the local traffic. The record contains no evidence on this subject although at the time these proceedings were conducted in the lower court it would have been possible, by considering the traffic and rates at other ferries and the natural growth of travel, to have formed some estimate of future earnings. Of all this the record shows nothing. As this Court recently remarked, in another case:

> "So far as it is given to us to look into the future, it seems as certain as anything of such a nature can be, that the demand . . . will increase, and, at the reduced price, increase to a considerable extent."

Wilcox vs. Consolidated Gas Co., 212 U. S. 19, 44.

Under these conditions, we believe that the rates established by the Freeholders were reasonable. They have been in force now for several years, and should not now be disturbed without considering the results of this practical test.

E. PARMALEE PRENTICE,
For Defendant in Error.

JOHN GRIFFIN,
GEORGE WELWOOD MURRAY,
Of Counsel.

APPENDIX

An act concerning ferries

Passed February 6, 1799

General Statutes (1709–1895), 1469
Compiled Statutes (1709–1910), 2308.

1. That the board of chosen freeholders shall be, and they hereby are empowered and directed to fix the rates to be taken at the several ferries within their respective counties, and the same, from time to time, to revise, alter, amend, or make anew at their discretion.

2. That the owner or keeper of every ferry shall put up and maintain, where such ferry is kept, a post, with a table of the rates, fairly printed, written or painted, in large capitals, fixed and allowed by the said board, annexed thereto, and set up such post, with the table aforesaid, so near the place where the passengers enter the boat used for such ferry, that the said table and rate shall be open and visible to the said passengers; and if the owner or keeper of any ferry shall fail, neglect or refuse to put up and maintain a post and table of rates, in the manner and form aforesaid, he shall, for every day he may so fail, neglect or refuse, forfeit and pay one dollar, to be recovered by action of debt, with costs of suit, by any person who will prosecute for the same.

3. That the clerk of such board shall be entitled to receive, for a copy of the rates aforesaid, certified under his hand, the sum of fifty cents.

4. That if any ferryman, keeper of a ferry, or his servant, shall demand or take a greater sum for ferriage, than the rate fixed by the said board, he shall, for every such

offense, forfeit and pay three dollars, to be recovered by action of debt, with costs of suit, by any person who will prosecute for the same.

5. That the owner or keeper of every ferry shall, at all times, be provided with good and tight boats, flats, wherries or other vessels, suited to such ferry, sufficient in size, strength, steadiness and accommodation, for the safe and speedy transportation of passengers, horses, cattle, carriages and goods, well furnished with sails, oars, setting-poles, or other necessary implements, and men, prudent, skillful, able-bodied, sufficient and competent to such business and service.

6. That no ferryman shall carry or attempt to carry any person over any ferry in a boat, flat, wherry, or other vessel, that is not good and sufficient according to this act, under the penalty of ten dollars, to be recovered by action of debt, with costs of suit, by any person who will prosecute for the same.

7. That every owner or keeper of a ferry, who shall not provide good and sufficient sails, oars, setting-poles or other necessary implements as aforesaid, and such man or men as the condition of the passage shall require, qualified according to this act, for the safe and speedy transportation of passengers, horses, cattle, carriages, and goods, shall, for every default therein, pay two dollars, to be recovered by action of debt, with costs of suit, by any person who will sue for the same.

8. That every ferryman shall give constant and diligent attendance at his ferry, and shall not deny or unnecessarily delay the carrying over any passenger, horses, cattle, carriages or goods, upon the penalty of three dollars for every such offense, to be recovered by action of debt, with costs of suit, by any person who will sue for the same; and such ferryman shall also be liable to an action for damages, at the suit of the party aggrieved; provided always, no ferryman shall be obliged to put off from his wharf or shore, and pass

the said ferry, when it manifestly appears to be hazardous or dangerous for him so to do, on account of any storm, tempest, fresh, or ice.

9. That every ferryman shall have authority to keep or put out of his ferry-boat or other vessel, any person who shall attempt or press to enter, or who shall enter or stay in his said boat or vessel, contrary to his order; and such person so doing contrary to his order, shall pay one dollar for every offense, to be recovered by action of debt, with costs of suit, by any person who will sue for the same.

10. That all persons shall be received into such ferry-boats or vessels, and carried over the ferry according to their arrival or first coming to the said ferry; and any ferryman acting contrary to this rule, shall be liable to the penalties prescribed in and by the eighth section of this act; provided, all public officers, and such as go on public or urgent occasions, as posts, couriers, physicians, surgeons and midwives, shall be carried over first or with the first.

11. That all owners or keepers of ferries shall make, keep and maintain good and safe wharves or places of landing, where they are wanted, upon penalty of forfeiting such sum as the inferior court of common pleas of the county, where the same shall be wanted, shall, upon complaint to them made, determine and adjudge to be sufficient to make or repair such wharf or convenient landing; which forfeiture shall, by order of the said court, be appropriated and laid out for that purpose.

Supreme Court of the United States

October Term, 1911

No. 60.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

Plaintiff-in-Error

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Supreme Court of the United States

OCTOBER TERM, 1911.

No. 274.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff-in-Error,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,

Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

I.

Statement of the Case.

This is a proceeding in error (Case No. 274), being a writ of error to the Supreme Court of the State of New Jersey and to the Court of Errors and Appeals of the State of New Jersey, to review the judgments of the State courts sustaining resolutions of the Board of Chosen Freeholders of the County of Hudson in the State of New Jersey, regulating rates of ferriage on the railroad ferries over the Hudson River between the States of New Jersey and New York.

The question involved is the right of the Board of Chosen Freeholders of the County of Hudson in the State of New Jersey to regulate the rates of ferriage to be charged by the New York Central & Hudson River Railroad Company on its ferry across

the Hudson River, between the State of New Jersey and the State of New York.

The manner in which the question is raised is:

On the 6th day of July, 1905 (record, p. 9), the Board of Chosen Freeholders of the County of Hudson passed the following resolution:

> "RESOLVED, that, in the exercise of its discretion, and pursuant to the direction of said last mentioned Act (of Feb'y 6th, 1799) this Board does hereby fix the rates of ferriage to be charged by the aforesaid companies for the transportation of foot-passengers from the County of Hudson to the terminal of said ferries in the State of New York, and from said terminal, returning to the County of Hudson, at the rate of six cents for each adult person for the round trip, and four cents for each person under ten years of age."

And, on the same day, passed the following resolution (record, page 11):

> "RESOLVED, that, in the exercise of its discretion, and pursuant to the direction of said last mentioned Act, this Board does hereby fix the rates of ferriage to be charged by the aforesaid companies for the transportation of passengers from the County of Hudson by said ferries to the terminal of said ferries in the State of New York, at the rate of three cents for each adult person and two cents for each person under ten years of age."

On the 1st day of May, 1906 (Record, page 3), a writ of certiorari was issued out of the Supreme Court of New Jersey, directed to the Board of Chosen Freeholders of the County of Hudson, commanding that Board to certify and send to that Court the said resolutions, with all things touching and concerning the same.

On May 6, 1907, the Supreme Court of New Jersey adjudged (Record, page 48) that the said resolutions brought up by the writ "be and the same are hereby set aside with costs."

The opinion of the Supreme Court, in pursuance of which the above judgment was entered, was (Record, page 50) to the ef-

fect that the regulation of rates of ferriage of foot passengers across the Hudson River from New Jersey to New York on the ferries of the New York Central and Hudson River Railroad Company is a regulation of interstate commerce and beyond the power of New Jersey, under the Federal Constitution.

On September 9, 1907, a writ of error was issued from the Court of Errors and Appeals of the State of New Jersey, in favor of the Board of Chosen Freeholders of the County of Hudson, against the New York Central & Hudson River Railroad Company, defendant-in-error (Record, page 48), commanding the Supreme Court to send the judgment so entered to that Court for consideration.

On June 14, 1909, an order was entered in the Court of Errors and Appeals (Record, page 77), reversing the judgment of said Supreme Court in all things.

The majority opinion of the Court of Errors upon which the above judgment was entered was, in substance (Record, page 58), that the line of later cases decided by the Federal Supreme Court, ending with the case of *St. Clair County vs. Interstate Transfer Company*, 192 U. S., 454, had not definitely decided that a State cannot fix rates of ferriage from itself to another State, and therefor it cannot be regarded as finally decided in the Federal Court that the decision in 4 Zab., 718, is in conflict with, and is therefore superseded by the Federal decisions.

On the 3rd day of December, 1909, the record having been regularly remitted to the Supreme Court, there was a judgment entered in the New Jersey Supreme Court, in pursuance of the remittitur of the Court of Errors and Appeals (Record, page 78), ordering that the previous judgment of the Supreme Court be reversed, and that the resolutions of the Board of Chosen Freeholders of the County of Hudson, brought up by the writ of certiorari, "be in all things affirmed."

And on the 9th day of April, 1910, a writ of error from this Court to the Supreme Court of New Jersey (Record, page 2), was allowed by Mr. Justice Holmes.

The West Shore Railroad extends by rail from Buffalo in New York State to Weehawken, in the County of Hudson, state of New Jersey, thence by ferry to New York City. The rail terminus is located at Weehawken. In connection with this terminus are ferries across the Hudson River to various points in the City of New York. The railroad and ferries are operated by the New York Central & Hudson River Railroad Company as lessee. The ferry boats are licensed and enrolled by the United States and the pilots and engineers perform their duties on the boats under license from the Federal Government (Record, pp. 17-18).

The primary purpose of the ferries is to continue across the Hudson River the freight and passenger business of the main trunk line on the western littoral of the Hudson. The ferries are an integral and indispensable part of a railroad system.

On the 6th of July, 1905, the Board of Chosen Freeholders of Hudson County adopted certain resolutions (Record, pp. 10-11) attempting to fix the rate of ferriage to be charged by the prosecutor on the ferries between the railroad terminal of the West Shore Railroad at Weehawken and Franklin Street and other places in the City of New York.

The recital in the resolutions refers to an Act of the State of New Jersey entitled, "An Act concerning Ferries," passed February 6th, 1799, as the Act pursuant to which the resolutions were passed.

The part of the Act necessary to the decision of this case is as follows:

> "Section 1. That the Board of Chosen Freeholders shall be and they are hereby empowered and directed to fix the rates to be taken at the several ferries within their respective counties and the same from time to time to revise, alter, amend or make anew at their discretion."

The two resolutions above quoted were passed on the same day by the Board of Chosen Freeholders of the County of Hudson, in pursuance of that statute. These resolutions affect the whole traffic of the railroad, excepting freight and passengers who

travel in vehicles, since all other persons who cross the ferry are foot-passengers from the County of Hudson.

The rate so fixed was considerably lower than the rates heretofore charged by the Company (Record, p. 43; Ex. P-4) and allowed by the Railroad Act of 1903 of the State of New Jersey.

The parts of that Act necessary to the decision of the case are as follows (Laws of 1903, page 656; entitled, "An Act Concerning Railroads, Rev. of 1903"):

> "Section 19. Where the terminus of a railroad company may be on the shore of any river or navigable waters of this State, such company may establish and operate ferries for the transportation of persons and property on or across the same, subject to the rates of fare and tolls provided in this Act on Railroads, and may buy or build vessels and boats and do all things necessary or convenient to carry on such ferry, or may contract with other ferry companies for the transportation of the passengers or freight of such railroad company.
>
> "38. Any railroad company may demand and receive such sum of money for the transportation of persons on its railroad and connections, and for any other services connected with the business of transportation of persons on or over said railroad, or to or from the same, as it shall, from time to time, think reasonable and proper, not exceeding, in the case of railroad companies organized under this Act, three cents per mile for carrying each passenger on such railroad, and not exceeding, in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter; but no charge shall be required to be less than ten cents. * * *"

The ferry rates and charges in force and exacted by the plaintiff-in-error were those set forth in and upon the "Schedule" posted in the Ferry House, and a copy of which was duly filed with the Interstate Commerce Commission on May 29th, 1903 (Record, pages 34, 43, Ex. P-4).

II.

Specification of the Errors Relied On.

The errors relied on are Errors B and C (Record, pp. 85-6).

"B. Because said judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment of the Supreme Court of said State, entered in pursuance thereof and in conformity therewith, are in favor of the validity of the resolution of the Board of Chosen Freeholders of the County of Hudson, brought up by the writ of certiorari in said record contained, and in favor of the validity of the statute of said State entitled 'An Act concerning Ferries', passed February 6th, 1799 (General Statutes of New Jersey, pages 1469 to 1471), and in favor of the validity of the authority attempted to be exercised by the said Board of Chosen Freeholders, under said State of New Jersey, pursuant to the provisions of said statute as administered and applied to the plaintiff-in-error, for the purpose of regulating and fixing the rates of ferriage to be charged by it upon the ferries operated by it and mentioned and described in said record; whereas, in said cause, judgment should have been against the validity of said resolutions and the statute and authority as so administered and applied to the plaintiff-in-error."

"C. Because in and by said record and judgment it is adjudged that the resolutions of the Board of Chosen Freeholders of the County of Hudson, brought up by the writ of certiorari in said record contained, should be in all things affirmed, notwithstanding said resolutions and the aforesaid statute of said State, pursuant to and by authority of which said resolutions were adopted, and the administration of said statute and the authority attempted to be exercised by said Board of Chosen Freeholders, under said State of New Jersey, pursuant to the provisions of said statute, as applied to the plaintiff-in-error for the purpose of regulating and fixing the rates of ferriage to be charged by it upon said ferries mentioned and described in said record, violate the Constitution and Laws of the United States in the manner and in the particulars following, to wit: * *

"2. That they violate Section 1 of the 14th Amend-

ment to the Constitution of the United States, by depriving the plaintiff-in-error of its property without compensation and without due process of law.

"3. That they violate the Commerce Clause of Section 8 of Article I. of the Constitution of the United States, by attempting to regulate and control interstate commerce.

"4. That they violate Section 1 of the 14th Amendment to the Constitution of the United States, by denying to the plaintiff-in-error the equal protection of the laws.

"5. That they violate the Statute of the United States entitled, 'An Act to regulate Commerce,' approved February 4th, 1887, and the supplements thereto, by attempting to regulate interstate commerce carried on by means of ferries operated by the plaintiff-in-error, although such commerce is now regulated by the statute aforesaid.

"6. That they violate Section 8 of Article I of the Constitution of the United States, and the 14th Amendment to the Constitution of the United States:

"(a) By attempting to regulate interstate commerce upon and over the public navigable waters of the United States.

"(b) By attempting to regulate interstate commerce over a post-route of the United States, or over a portion thereof.

"(c) By attempting to regulate commerce carried on by means of boats carrying property of the United States Government over the public navigable waters of the United States.

"(d) By attempting to regulate commerce carried on by means of boats enrolled and licensed for the coasting trade under United States statutes, and which navigate the public navigable waters of the Hudson River under authority of such enrolment and license."

III.

Brief of the Argument.

The subject matter as herein complained of is the assumption of the right of a municipality of one State to regulate the fares to be charged for the transportation of passengers *via* a ferry operated by a foreign corporation, upon and across navigable boundary waters.

(a) It conflicts with the Commerce Clause of the Constitution of the United States.

(b) Congress has legislated concerning such ferries operated by railroad companies.

(c) The Board of Freeholders of the County of Hudson in the State of New Jersey has not such powers.

Argument.

POINT (a).

The regulation of the rates and fares for transportation via these ferries is inoperative because it conflicts with the commerce clause of the Constitution of the United States.

This question came before the Court in *Covington, &c., Bridge Company v. Kentucky,* 154 U. S., 204, decided eighteen years ago (1894). The Bridge Company was incorporated under the laws of Kentucky. The bridge spanned the Ohio River between Kentucky and Ohio. The case arose on indictment found by the Grand Jury of Kenton County, Kentucky, against the Bridge Company for collecting tolls alleged to be illegal because of a statute of the State of Kentucky amending the act of incorporation and fixing the rate of tolls and prescribing penalties for violation. The Bridge Company was tried, found guilty and fined $1,000. The Court of Appeals of Kentucky affirmed the judgment and certified

the following question, *inter alia,* as arising under the constitution and laws of the United States:

"Whether such acts were in violation of the exclusive power of Congress to regulate commerce among the States."

In delivering the opinion of the court, Mr. Justice Brown stated:

> "This case involves the power of a State to regulate tolls upon a bridge connecting it with another State without the assent of Congress and without the concurrence of such other State in the proposed tariff."

The opinion maintains that the power of the States over the general subject of commerce are divisible into three classes:

1. Those in which the power of the State is exclusive.
2. Those in which the States may act in the absence of legislation by Congress.
3. Those in which the action of Congress is exclusive and the States cannot interfere at all.

The Court held that commerce over the bridge connecting two States was interstate; in other words, that such commerce fell under the third class; that a bridge between two States is an instrument of commerce and a toll thereon is a tax on commerce (p. 219).

An attempt was made to distinguish a bridge from a ferry-boat and to argue that while the ferry-boat is an instrument of interstate commerce, the bridge is not. The Court declared (p. 218) that both are vehicles of interstate commerce.

The Court further says (p. 212):

> "That while the States have the right to tax the instruments of such commerce as other property of like descriptions is taxed under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities."

Commerce national in character is for Congress to regulate. Non-action implies it shall be unregulated (p. 212).

The statement is made on page 212, that the prior cases were

all reviewed and the subject exhaustively treated in *Wabash, &c., Railway v. Illinois,* 118 U. S., 557. In this case the Court said (p. 575):

> "We must therefore hold that it is not and never has been the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the States, is a valid law."

And in the *Covington Bridge Company* case, *supra,* the Court on page 217, after explaining *Wabash Railway v. Illinois,* says:

> "In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash* case, and to that doctrine we still adhere."

The *Covington Bridge Company* case has been cited many times by the Court.

In the *Lottery* case, 188 U. S., 352, the Court refers to the *Covington* case, the *Iocester Ferry* case, 114 U. S., 196, and several others and says:

> "This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communications, traffic, the transit of persons, * * * They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions upon the exercise of the power as are found in the constitution of the United States; that such power is plenary, complete in itself and may be exercised by Congress to its utmost extent, subject *only* to such limitations as the constitution imposes upon the exercise of the powers granted by it."

In *Hanley v. Kansas City Southern Ry. Co.,* 187 U. S., the

Court said, citing the *Wabash* case, the *Covington Bridge* case and the *Hall v. DeCuir*, 95 U. S., 485:

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress."

The *Covington Bridge* case was cited by the Court (1904) in *St. Clair County v. Interstate &c. Transfer Co.*, 192 U. S., 454, It was approved and upheld.

On March 14th, 1912, an opinion was given by Sessions, J., in the District Court of the United States for the Western District of Michigan, in Equity, in the *International Transit Company, Complainant, vs. The City of Sault Ste. Marie and Others, Defendants*, a copy of which opinion is to this brief annexed as an appendix. The Court says: see Appendix, p. .

> "Two questions are thus presented:
>
> "*First.* Has a State municipality the right and power to license a ferry operated by a foreign corporation upon and across navigable international boundary waters? And
>
> "*Second.* As a municipal regulation, can the State municipality prescribe and fix the rates of fare to be charged by the owner for the transportation of persons and property upon such ferry?
>
> "The first question has not been definitely answered in adjudicated cases in the Federal Courts. * * * By inference, at least, the right to such license fee is negatived in the following cases, where the *Wiggins Ferry* case is cited and construed. * * *
>
> "The second question must be answered in the negative upon the authority of the *Covington Bridge Company v. Kentucky*, 154 U. S., 204, in which it was held that the State of Kentucky has no power to fix or regulate tolls upon a bridge over a navigable stream between the States of Ohio and Kentucky. The positive language of the Supreme Court in that case, when applied to the facts in the present case, settles beyond controversy that the City of Sault Ste. Marie has no power to fix rates and charges for the transportation of persons and property upon an international ferry."

The New Jersey Case:

The case of *Chosen Freeholders v. State*, 3 Zab., 206, affirmed, 4 Zab., 718, purports to sustain the right and power of the State authorities to regulate the rates and fares chargeable for interstate ferry transportation.

In determining, however, the weight of that case as authority at the present time there are two subjects worthy of careful consideration, viz:

(a) The cases cited as authority for the conclusion there announced did not involve and were not authoritative upon the point decided.

(b) The status of affairs upon which the reasoning of the opinions proceeded, merely, absence of federal legislation upon the subject, was superseded by the act of Congress of 1866, Chapter 124, and of 1887, Chapter 104, regulating interstate transportation.

The cases cited as supposedly supporting the proposition are:

People v. Babcock, 11 Wend., 586;
Gibbons v. Ogden, 9 Wheat., 203;
Smith v. Turner, 7 How., 393;
Cooley v. Board of Wardens, 12 How., 319.

In *People v. Babcock* it was adjudged that Babcock was liable to a penalty prescribed by State statute for using without license a ferry in transporting persons and property across the Niagara river from Youngstown in Niagara County.

The court by Nelson, J., at page 590, said:

"The county of Niagara extends westerly to the middle of the Niagara river, and the power of the court of common pleas of that county to license ferries within its limits, is without qualification. 1 R. S., 526, Sec. 1. So far as jurisdiction is concerned, it is as complete over this river to the center thereof, as over any other stream within the county."

This is the exact opposite of authority for regulation of the entire transportation, or the part thereof beyond the bounds of the State.

As regards *Gibbons v. Ogden*, its authority in relation to the question involved in the case at bar is well stated by Mr. Justice Field, writing for the Court in the case of *Gloucester Ferry Co. v. Pennsylvania* (114 U. S., 196), at pages 215, 216:

> "The power of the State to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons v. Ogden*, Chief Justice Marshall said that laws respecting ferries as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country, for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners, that is, the subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States. Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question."

The principle decided in the case of *Smith v. Turner* is succinctly stated in the syllabus as follows:

> "A State law, which requires the masters of vessels engaged in foreign commerce, to pay a certain sum to a State officer, on account of every passenger brought from a foreign country into the State, or before landing any alien passenger in the State, is inoperative, by reason of its conflict with the constitution and laws of the United States."

The case of *Cooley v. Board of Wardens* involved the validity of State laws requiring payment of pilotage charges. Mr. Justice Curtis writing (12 How., at page 320) said:

> "It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the State in which the legislation of Congress has left it. We go no further."

And Mr. Justice Daniel at page 326 said:

> "The power delegated to Congress by the constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they embrace; the permission or terms accordingly to which they may be introduced; and do not necessarily nor even naturally extend to the means of precaution and safety adopted within the waters or limits of the States by the authority of the latter for the preservation of vessels and cargoes, and the lives of navigators or passengers. These last subjects are essentially local—they must depend upon local necessities which call them into existence, must differ according to the degrees of that necessity. It is admitted, on all hands, that they cannot be uniform or even general, but must vary so as to meet the purposes to be accomplished. They have no connection with contract, or traffic, or with the permission to trade in any subject, or upon any conditions."

In so far as these cases bear upon the point presented in the case of *Freeholders v. State,* to wit, the power to regulate fares for carriage in part without the State they are clearly and plainly against instead of at all supporting the conclusion announced in that case.

Mr. Justice Elmer writing for the Court of Errors and Appeals (*Chosen Freeholders Hudson County v. The State,* 4 Zab. (728) said:

> "Whether the power of regulating commerce between the States is to be considered as vested exclusively in Congress, so that the legislatures of the several States cannot constitutionally pass any law on the subject, although it may not conflict with any existing treaty or law of the United States, has not yet been authoritatively settled by the Supreme Court of the United States."

This is tantamount to saying that the State regulation would not be sustained if there existed such federal legislation as now exists upon this subject.

Immediately following the expression above quoted is this:

> "But conceding it to be so, the regulation of the tolls of bridges and turnpike roads, and the fares of railroads and ferries, is in no just sense a regulation of commerce, and has never been so regarded. It is a part of that general power of police, essential to every State, and which could not be with safety, and has not been, surrendered to the general government."

Of this it is sufficient to say that authorities to the contrary are so numerous and uniform as to exclude the necessity of citing them.

Contention sustaining the validity of this resolution involves the obviously anomalous proposition that the State may prescribe the rates chargeable for interstate transportation performed under express authority of the United States and by means of instrumentalities which are exclusively the subjects of federal governance.

Federal legislation provides, *inter alia*, the following:

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination" (R. S. 5,258).

In respect of such boats and ferries federal statutes prescribe rules governing entering, clearing, masters presentation of manifests and payment of entrance and clearance fees (R. S. 2,792); regulation in respect of lights, signals, steering and sailing rules, methods of avoidance of collision and risk, and requirement of obedience to rules prescribed by the Board of Supervising Inspectors of Steam Vessels (R. S. 4,233); inspection of hulls (R. S. 4,417); inspection of boilers (R. S. 4,418, 4,426, 4,430); exhibition of certificates of inspection (R. S. 4,423); enrollment and license of vessels (R. S. 2,312, 2,313, 4,314, 4,319, 4,321); license of masters, mates, engineers and pilots (R. S. 4,406, 4,407, 4,438, 4,443); exclusion of State regulation of pilots (R. S. 4,444); investigation of officers as to their competency and faithfulness (R. S. 4,450); and authorization of foreign railroad corporations to enter the United States by means of ferry (R. S. 4,370).

The contention involves the hypothesis that interstate transportation upon and over navigable waters of the United States, carried on by virtue of express authority of federal statute, by means of instrumentalities thereby prescribed, which instrumentalities the federal government inspects, and upon inspection enrolls and licenses, prescribes the methods of and rules to govern their employment and use, examines and licenses the masters and other officers to be employed, supervises their conduct and upon occasion determines whether they may be continued in such employment, nevertheless is within the province

of the State to prescribe the compensation which may be exacted for such service.

The power of State regulation cannot be of wider scope than State governance and State protection.

State police power cannot embrace a calling or business outside its territorial domain.

The business consisting of continuous trip transportation traversing the waters of two or more States, the police power of each State can regulate only such part and so much of such transportation as is within the State which assumes exercise of such power.

The police power of the State does not extend to regulation of the charge to be exacted for interstate commerce transportation.

The police power of one State does not embrace that of fixing the compensation to be exacted for a service, or portion thereof, which is performed in another State.

The rule administered by the courts is, upon principle, reciprocal, to wit: that the federal government does not by its charter of a corporation with power to carry on both interstate and intrastate commerce place within its jurisdiction the power of regulation of the rates or fares chargeable by such corporation for its service in intrastate transportation or transmission; and the State government, by its charter of a corporation with the same powers, does not place within its jurisdiction the power of regulation of the rates of fares chargeable by such corporation for its service in interstate transportation or transmission.

POINT (b).

Congress has legislated concerning ferries operated in connection with railroads.

The Interstate Commerce Act of February 4th, 1887, by the terms of Section 1, applied to any common carrier engaged in the transportation of passengers or property wholly by railroad

or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment from one State or Territory of the United States.....to any other State or Territory of the United States, with a proviso that the provisions of the act should not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

> "The term *'railroad'* as used in this act shall include all bridges and *ferries* used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage."

The Hepburn Amendment of 1906 leaves this language unchanged.

The prosecutor filed in 1903 a copy of its tariff with the Interstate Commerce Commission (Case, p. 34, l. 23; Exhibit P-4, Case, p. 43).

The interstate commerce act imposes upon the prosecutor, as the lessee and operator of the West Shore Railroad and the said ferries, the duty of fixing tariff rates of fare for interstate transportation thereby afforded, inclusive of the ferriage fares of passengers and vehicles carried upon the said ferries, and of filing such tariffs with the Interstate Commence Commission; and prohibits increase or decrease of or departure from such thus designated rates except after the lapse of the period named to follow notice of change thereof as in the said act provided.

In obedience to that requirement the prosecutor company filed with said Commission its tariff schedule of rates of fares and tolls for carriage of passengers and vehicles upon the said ferries as by it determined, adopted and made effective on or about June 15, 1888; Revised June 1, 1903 (Exhibit P-4, p. 43).

By the requirement of the Act of Congress of the filing of this tariff, and the filing of the tariff in obedience thereto, the tariff became a law governing the transportation precisely as if the tariff itself had been enacted by Congress in the same words and figures.

The Gulf, Colorado & Santa Fe R. Co. vs. Hefley & Lewis, 158 U. S., 98; 39 L. Ed., 910;
Texas & Pacific R. Co. vs. Dryden, 202 U. S., 242; 50 L. Ed., 1111;
Missouri Pacific R. Co. vs. Larabee Mills Co., 211 U. S., 612, 623; 53 L. Ed., 352;
Poor vs. C., B. & Q. R. Co., 12th Interstate Commerce R., 418, 422;
Armour Packing Co. vs. United States, 209 U. S., 56, 80, 81.

We respectfully submit that the exercise of the power which the Board of Chosen Freeholders here assets is in conflict with the exclusive power of regulation of the same subject matter by Federal authority.

In *Sinnott v. Davenport,* 22 How., 227, Mr. Justice Nelson, writing for the Court, at page 243 said:

> "The whole commercial marine of the country is placed by the constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State legislature derived its enactment."

The ferry-boats are subjects of admiralty jurisdiction.

In the case of *The St. Louis,* 48 Fed. Rep., 312, Barr, J., said:

> "The steamer St. Louis is owned and used by the claimant defendant for the purpose of transporting its trains across

the Mississippi river. It is really a steam ferry-boat, with iron rails so adjusted as to permit the trains of the defendant to be run over and upon it, and thus be transported across the Mississippi river by the steamer. This boat is registered, has a large tonnage, and has the capacity of transporting freight and passengers other than those in or on a train of cars; but it is not thus used, nor was it at the time the wages were earned by the libellant. The defendant insists that this ferry-boat was a part of the line of its railroad, under section 5,258 of the revised statutes, and therefore not subject to the jurisdiction of an admiralty court. That section authorizes 'railroads to carry upon and over its road, boats, bridges, and ferries, all passengers,' etc., 'mails, freights, and property, on their way from any State to another State, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination.' But we do not think it has any bearing upon the question of the jurisdiction of the courts of admiralty. It was passed by Congress under the commercial clause of the constitution, and authorizes continuous lines of railroad from one State to another State, and thus secures interstate commerce against obstacles, even if attempted by State action; and was not intended to deprive courts of admiralty of any jurisdiction which they otherwise had. The question of jurisdiction is to be considered without regard to this section of the statutes. The Mississippi river is within the jurisdiction of courts of admiralty; and as the St. Louis is a large boat, propelled by steam across that river from one State to another, it would seem there can be no doubt this case is within admiralty jurisdiction."

In *Railroad Co. v. Richmond,* 19 Wall., 584, Mr. Justice Field, writing for the Court, after quoting from act of Congress of 1866, Chap. 124 (now Rev. St., 5,258), and act of 1866, Chap. 246, entitled "An act to authorize the construction of certain bridges, and to establish them as post roads," and commenting upon them at page 589, said:

> "These acts were passed under the power vested in Congress to regulate commerce among the several States and were designed to remove trammels upon transportation between different States, which had previously existed, and to prevent the creation of such trammels in future."

"The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation."

This statement of Mr. Justice Field was quoted approvingly in the opinion written by Mr. Justice Matthews in the case of *Bowman v. Chi. & N. W. Ry. Co.*, 125 U. S., 465, 484.

In *Illinois Central Railroad Co. v. Illinois*, 163 U. S., 142, the statement of the case included (page 146) quotation of the act (now Rev. St. Sec. 5,258), and Mr. Justice Gray, writing at page 153, said:

"Upon the state of facts presented by this record, the duties of the Illinois Central Railroad Company were not confined to those which it owed to the State of Illinois under the charter of the company and other laws of the State; but included distinct duties imposed upon the corporation by the constitution and laws of the United States."

The said resolutions contain no provision in respect of the time at which they are to go into effect.

They purport to become effective immediately upon their adoption and on notice to prosecutor company. Prosecutor's obedience thereto would have ben violative of the express inhibitions of the interstate commerce acts and subjected it to the penalties therein prescribed in respect of such violation.

Any measure or degree of control of the rates of fare upon the said ferries by the said Board of Chosen Freeholders is inconsistent with the exclusive power of regulation thereof prescribed and exercised in, by and under authority of the interstate commerce act.

Exercise by the State of its power to create corporations and confer upon them charter powers to maintain and operate instrumentalities of interstate transportation does not draw to the State the power of regulation of the rates of fares or tolls for such transportation. State license to build, maintain and

use a bridge, or to establish and operate a ferry as an instrumentality of transportation across the navigable waters of the United States from such State to an adjoining State does not draw to the State or derogate from the United States the power of regulation of fares or tolls of interstate traffic upon such bridge or ferry.

The enactment by Congress of the regulation prescribed by the Interstate Commerce Act constitutes exercise of the power vested in it by the Federal Constitution to regulate commerce among the several States. The rules which it prescribes apply to and govern the subject matter thereof entire, irrespective of the nature or character of the person or association by whom the business is conducted.

The regulation applies to and governs the business regardless of whether that business be conducted by one or more persons in their individual capacity or by an association or body corporate created under the laws of any State or Territory or of the United States or of a foreign dominion.

It is not a matter of consequence that the charter power, license or permission to inaugurate, establish, acquire, maintain or conduct the instrumentality for carrying on the transportation may have been the grant of the State. As instance, the statutes of New York providing for license of ferries and making it a misdemeanor to operate a ferry without such license.

Considering the ferry as the landing, the license and regulation of its maintenance and operation may be of State cognizance, and nevertheless, if the ferry be interstate the ferriage fare is the subject of United States governance.

The State which creates a corporation may give to or withhold from it the corporate power to establish and operate a ferry.

The State may adopt and enforce its own policy in respect of the corporate power which it will confer upon the corporations which it creates.

If and in so far, however, as the State does confer and vest the corporate power to become and be an instrumentality in

and about the carrying on of interstate transportation, the State must be deemed to have consented that the corporation as such instrumentality, and the rates of fares and tolls which it may exact in and for such service, shall be subject to federal and not State control, because by the commerce clause of the Federal Constitution the States granted to the Federal Government the entire and exclusive power of regulation of that subject matter.

Contention for validity and enforcement of these resolutions as regulation of the ferries operated by the prosecutor, its contention that the Federal Congress in and by its enactment of the acts to regulate commerce, and therein prescribing regulation of "ferries used or operated in connection with any railroad", transcended the power conferred upon it by the Federal Constitution.

If the interstate commerce acts, in this particular, are constitutional they alone prescribe and furnish authoritative regulation of these ferriage rates and the resolutions of the Board of Chosen Freeholders are void. If the resolutions are valid and govern these rates, it is because the acts of Congress purporting to prescribe regulation of the same subject matter are void.

Having in mind that the West Shore Railroad, exclusive of the ferries, is in and of itself an interstate railroad performing complete upon its own rails interstate transportation, that the ferries, exclusive of the railroad, are interstate ferries, performing complete interstate, and none other than interstate, transportation, and that the ferries are used and operated by and under the same management as, and in connection with the railroad; the contention that in such case regulation of the ferry rates is not within the power of the Federal Congress would seem without force.

POINT (c).

The Board of Freeholders of the County of Hudson has not the power to fix the rates of ferriage of foot-passengers on these ferries over the Hudson River, from New York to New Jersey.

The Supreme Court of the State held that the said Act of February 6, 1799, did not suffice to authorize the Board of Chosen Freeholders of the County of Hudson to fix the rates of ferriage of foot passengers at this ferry, from New Jersey to New York. The opinion of that Court was delivered by Justice Swayze (Record, p. 51).

Justice Swayze, as to the case of the *Board of Chosen Freeholders of Hudson against the State,* 4 Zab., 718, relied upon by the defendants, says (Record, p. 51):

> "The authority of the Freeholders was sustained by the Court of Errors and Appeals in *Chosen Freeholders of Hudson vs. State,* 4 Zab., 718, decided in 1853, and this case is relied upon by the defendants. It differs, however, materially from the present case. The attempt there was to regulate the rates of ferriage to be taken at the ferry in Jersey City, and the Supreme Court and Court of Errors and Appeals sustained the regulation upon the theory that the ferry meant the wharf and establishmnet set up at the terminus within this State. 3 Zab., 212; 4 Zab., 722, 724, where Judge Elmer drew the distinction between a ferry establishment and the way across the water. Both in the Supreme Court and Court of Errors it was recognized that the power of New Jersey was limited by the State line and did not extend so far as to permit the regulation of rates within the boundaries of New York. The resolutions now before us purport to regulate the entire cost of transportation across the river. There is an obvious difference between fixing a rate to be taken at the ferry in Jersey City, which leaves it open for New York to fix a rate on its side of the river and for the owner of the ferry to charge the sum of two rates for transportation, and fixing a rate which shall be operative in the jurisdiction of another State.

"Another distinction is that in the former case the ferry seems from the report to have been distinct from the railroad, although it was kept by the railroad company. It is common knowledge that there has been a great development and change in this respect in the last fifty years, and in the present case, the ferry instead of being separate and distinct from the railroad, is in fact a continuation thereof, forming a necessary link in the line of communication between the City of New York and other portions of the State of New York.

"Not only is the case of *Chosen Freeholders of Hudson vs. State* distinguishable from the present, but its authority has been greatly shaken by a subsequent decision of our own court eleven years later. *Erie Railroad v. State*, 2 Vr., 531. That case involved the power of New Jersey to impose a tax on goods in transit across the State. In the Supreme Court the tax was sustained, and *Chosen Freeholders of Hudson v. State* was relied on as authority. *State v. D. L. & W. R. R. Co.*, 1 Vr., 473. The judgment was reversed and an opinion delivered by Chief Justice Beasley which ignored entirely the older cases. The failure of the Chief Justice to refer to the case is most significant. If *Chosen Freeholders of Hudson v. State* is an authority in favor of the right to regulate the rate for the transportation across the river, it is difficult to see why the same principle would not permit New Jersey to impose a tax upon goods in transit. The case was pointedly called to the attention of the Court of Errors and Appeals by the opinion of the Supreme Court, and the fact that it was ignored by the Chief Justice indicates either that he did not consider it an authority for the broad proposition above cited, or that he intentionally disregarded it. In either view, its binding force upon us is, to say the least, much weakened.

"Since, however, the question raised in the present case involves the power of the State under the federal constitution, our Court of Errors and Appeals is not the court of last resort. For an authoritative decision, we must look to the Supreme Court of the United States. Questions similar to the one before us have frequently arisen and been much debated since 1853. It would not help the discussion to refer to the numerous cases, and we confine ourselves to those which relate directly to ferries. We find it convenient to state them in chronological order."

Justice Reed, in reading his majority opinion for eight of the Judges of the Court of Errors, says (Record, p. 69):

> "My conclusion is that the decision of this Court in the case of *State vs. Chosen Freeholders of Hudson County*, which case controls the present, has not been overruled by the Supreme Court of the United States, in any decision which makes the present question *res adjudicata* in that court."

Chief Justice Gummere, in his dissenting opinion, speaking for five of the thirteen Judges in the Court of Errors, says (Record, p. 76):

> "For the reasons which I have given, I am compelled to dissent from the conclusions expressed in the majority opinion, namely, that the decision of this Court in the case of *The State vs. The Chosen Freeholders of Hudson County*, which case controls the present, has not been overruled by the Supreme Court of the United States in any decision, which makes the present case *res adjudicata* in that Court."

CONCLUSION.

The plaintiffs-in-error insist that the doctrine as to the legality of the resolutions in question, as stated in the opinion of Justice Swayze, when this matter was before the Supreme Court of New Jersey (Record, p. 51), and as stated by Chief Justice Gummere, in the Court of Errors and Appeals, when dissenting from the conclusion reached by a majority of the Judges of that Court (Record, p. 72), and as stated in the opinion of Judge Sessions, in the District Court of the United States for the Western District of Michigan, in the case of the *International Transit Company, Complainant, vs. the City of Sault Ste. Marie and others, Defendants*, appendix to this Brief, is, and should be, the doctrine of the Supreme Court of the United States, and that the resolutions brought up by the certiorari and the judgment of the Court of Errors and Appeals, and the judgment of the Supreme Court, in pursuance of said judgment of the Court of Errors and Appeals, should be set aside.

Respectfully submitted,

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APPENDIX.

In the District Court of the United States, For the Western District of Michigan.

NORTHERN DIVISION.

In Equity.

THE INTERNATIONAL TRANSIT COMPANY,

Complainant,

vs.

CITY OF SAULT STE. MARIE, ANDREW J. SHORT, Mayor, ANDREW J. EATON, Recorder, and EDGAR J. STEWART, Chief of Police,

Defendants.

The complainant is a corporation organized under the laws of the Province of Ontario, Dominion of Canada, and licensed by the Dominion Government to operate a ferry called "Kings Ferry" across St. Mary's River between Sault Ste. Marie, Ontario, and Sault Ste. Marie, Michigan. St. Mary's river is navigable for large boats and vessels and is a part of the boundary waters between the United States and Canada. Complainant owns and operates two steam vessels of Canadian register in its business of ferrying passengers and property across St. Mary's River between the two cities. It owns and uses a private wharf in the City of Sault Ste. Marie, Ontario, and leases and uses a private wharf or dock in the City of Sault Ste. Marie, Michigan, and does not make use of any dock, wharf or property of any kind belonging to the city. It maintains and has an office and warehouse upon the leased dock where all

fares and tolls are paid and received, none being paid or collected upon the boats. Complainant's license from the Dominion Government specifies the seasons during which the ferry shall be operated, the frequency of service to be given and the hours at which boats shall be run, fixes a schedule of rates to be charged for the several classes of transportation, passengers, vehicles and freight, prohibits the taking or receiving of any other or larger fares or tolls than those so imposed, and declares that by any failure to comply with its terms the right to operate the ferry shall be forfeited.

The defendant, City of Sault Ste. Marie, is a municipal corporation organized under the laws of the State of Michigan, and, by its charter granted by the state legislature, has the right, power and authority:

> "To establish or authorize, license and regulate, ferries to and from the city or any place therein, or from one part of the city to another, and to regulate and prescribe, from time to time, the charges and prices for the transportation of persons and property thereon."

Section 191 of the Legislative Act constituting the city charter also provides as follows:

> "The council may regulate and license ferries from the city or any place or landing therein to the opposite shore, or from one part of the city to another, and may require the payment of such reasonable sum for such license as the council shall deem proper; and may impose such reasonable terms and restrictions in relation to the keeping and management of such ferries, and the time, manner and rates of carriage and transportation of persons and property as may be proper; and provide for the revocation of any such license, and for the punishment, by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries and regulating those established and licensed."

Pursuant to the authority thus conferred, the council of the defendant city has adopted an ordinance entitled: "An ordinance to license and regulate ferries." Sections 1, 2 and 3 of such ordinance are as follows:

"Sec. 1. No person, persons, or company shall operate a ferry boat, or engage in the business of carrying or transporting persons or property thereon from the City of Sault Ste. Marie, Michigan, and across the St. Mary's River to the opposite shore, without first obtaining a license therefor from the Mayor and by otherwise complying with the provisions of this ordinance.

"Sec. 2. The Mayor of said City is hereby empowered and authorized to issue and grant a license, as herein provided, to any person, persons, or company, to keep, maintain and operate a ferry or ferries, for the carrying and transporting of persons and property from the City of Sault Ste. Marie, Michigan, across the St. Mary's River to the opposite shore, on his, or their paying into the City Treasury the sum of Fifty ($50) dollars annually for each boat so engaged in the carrying and transportation of persons and property, and for each launch, sail boat or row boat used and operated as a ferry from said City to the opposite shore, the sum of five ($5) dollars annually.

"Sec. 3. Before any license shall be issued or granted by the Mayor as provided in section two (2) of this ordinance, the person, persons or company desiring the same, shall make application therefor to the Mayor in writing, which application shall state the name or names of the boat or boats to be operated as a ferry or ferries, the place or places for receiving and landing persons and property by said ferry or ferries within said City, and which application shall also be signed by the person or persons desiring the license; and when said application is made by a company or corporation, said application shall be signed by the duly authorized officers of such company or corporation. Said application shall also contain a true and correct schedule of the rates of ferriage of persons and property proposed to be charged by the application within the territory prescribed by section two (2) of this Ordinance. And no license shall be issued or granted hereunder unless the application therefor shall conform to the provisions of this Ordinance. And any licensee, to whom a license shall have been issued under this Ordinance, who shall fail or refuse to conduct his or their business of ferrying under said license in accordance with the terms, provisions and conditions contained in the application therefor, or contrary to the provisions of this Ordinance, shall be deemed to have forfeited his or their

rights to operate said ferry or ferries, and shall subject the offender to the same penalties herein provided for operating a ferry or ferries contrary to this Ordinance without a license therefor."

Other sections of the ordinance specify, as minutely as the Canadian license, the season, frequency and hours of service and rates to be charged for the several classes of transportation. In all these particulars the rules specified by the ordinance are different from those prescribed by the Canadian license. The ordinance also provides that for failure to comply with any of its terms, the right to operate the ferry shall be forfeited and the company and its employees shall be subject to criminal prosecution.

Article 1 of the treaty between the United States and Great Britain relating to boundary waters between the United States and Canada contains this provision:

> "The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships vessels and boats of both countreis equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries."

The defendants seek to enforce the ordinance above mentioned by prosecution of the complainant's employees for failure to comply with it and complainant brings this suit to restrain such enforcement.

Complainant contends that, in operating its ferry and ferry boats, it is engaged in foreign commerce and that the enforcement of the city ordinance in question is a violation of the commerce clause of the Constitution of the United States which places the regulation of interstate and foreign commerce within the exclusive jurisdiction and control of Congress and is also a vio-

lation of the above quoted Article of the treaty between the United States and Great Britain. On the other hand, the defendants contend that the right to license and regulate ferries, even though they are operated upon and across boundary waters between states or between the United States and a foreign country, is one of the many powers reserved to the states and not delegated to Congress, and, therefore, that the enforcement of this ordinance is a lawful exercise of such power and is not an encroachment upon the constitutional powers of Congress, nor a violation of rights secured by treaty even though foreign commerce may thereby be incidentally affected.

In support of their respective contentions, counsel upon both sides rely upon decisions of the Supreme Court of the United States. Counsel for complainant insist that the later decisions of that court, particularly in the cases of *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S., 196, and *Covington Bridge Co. vs. Kentucky*, 154 U. S., 204, have settled the present issues in its favor, while counsel for defendants are equally insistent that the later decisions have in no wise modified or overruled the earlier ones, (*Gibbons vs. Ogden*, 9 Wheat., 1; *Fanning vs. Gregoire*, 16 How., 524; *Conway vs. Taylor*, 1 Black., 603, and *Wiggins Ferry Co. vs. East St. Louis*, 107 U. S., 365), by which they claim the questions here involved have been foreclosed in accordance with their contentions.

The difficult and delicate problem thus presented is precisely stated but not solved in *St. Clair County vs. Interstate Transfer Company*, 192 U. S., 454-465, where the court, after reviewing the cases above mentioned, says:

> "The position of the parties as to the cases which we have reviewed is this: The County (city) insists that the statement in *Gibbons vs. Ogden*, that the establishment of ferries was within the reserved powers of the States, and the rulings in *Fanning vs. Gregoire*, *Conway vs. Taylor*, and *Wiggins Ferry vs. East St. Louis*, affirmatively settle that a State may establish ferries over a navigable river, the boundary between two States, and license the same, and that doing so is not only not repugnant to the commerce clause of

the Constitution of the United States, but is in consonance therewith, since the power as to ferries was reserved to the States and not delegated to the national government. The *Gloucester Ferry* case, it is said, rested upon the nature of the particular tax imposed by the State of Pennsylvania, and that the case may hence not be considered as overruling the previous cases, not only because it did not expressly refer to them, but also because some expressions found in the opinion which we have cited are construed as substantially affirming the right of the State to regulate and license a ferry like the one here in question. On the other hand, the corporation urges that the rulings in *Fanning vs. Gregoire* and *Conway vs. Taylor* proceeded upon a misconception and partial view of the language of Chief Justice Marshall in *Gibbons vs. Ogden*. That language, it is insisted, when the sentences are considered which immediately precede the passage quoted in *Fanning vs. Gregoire* and *Conway vs. Taylor*, clearly demonstrates that the Chief Justice was referring to the power of the States to license and control ferries on streams of a local character, and this, it is said, is demonstrated by the statement on the subject in the *Gloucester Ferry* case. The case of *Wiggins Ferry vs. East St. Louis*, it is argued, preceded, not upon the right of the State over the ferry, but upon its power to tax property whose *situs* was within its jurisdiction, and this was the view adopted by the court below. The *Gloucester Ferry* case, it is urged, did not proceed upon the nature of the tax, but upon the want of power in the State of Pennsylvania to exert its control over a ferry crossing a river which was a boundary between two States, so as in effect to burthen the carrying on of interstate commerce. And that case, it is further insisted, therefore qualifies, if it does not specifically overrule, the earlier cases."

The rulings in *Gloucester Ferry Co. vs. Pennsylvania* and *Covington Bridge Co. vs. Kentucky*, when applied to the conceded facts of the of the present case, settle beyond controversy that the complainant is engaged exclusively in foreign commerce and that its ferry boats, wharfs, docks, offices and warehouses are all instruments of foreign commerce. But defendants insist that the power to regulate ferries, even though they are engaged in and are instruments of interstate or for-

eign commerce, is vested and rests in the state and its municipal corporations, and that such power to regulate includes the right to license and to require the payment of a license fee and also the right to prescribe rates and tolls for the transportation thereon of persons and property. Section one of the city ordinance under consideration provides that: "No person, persons or company shall operate a ferry boat, or engage in the business of carrying or transporting persons or property thereon" from the Michigan City across the river to the Canadian shore without first obtaining a license therefor from the Mayor and by otherwise complying with the provisions of this ordinance." Section two empowers and authorizes the Mayor of the City to issue and grant a license "*As herein provided*" upon the payment of the prescribed annual license fee. Section three provides that: "Before any license shall be issued or granted by the Mayor as provided in Section two of this ordinance, the person, persons or company desiring the same shall make application therefor to the Mayor in writing * * * signed by the person or persons desiring the license, * * * Said application shall also contain a true and correct schedule of the rates of ferriage of persons and property proposed to be charged by the applicant. * * * * And no license shall be issued, or granted hereunder unless the application therefor shall conform with the provisions of this ordinance." Section six prescribes in detail the tolls and fares to be charged for the ferriage of persons and property. It thus appears that the payment of a license fee and an agreement to comply with the terms of the ordinance as to tolls and fares are both conditions precedent to the obtaining of a license and to the right to engage in a business which is foreign or international commerce. It necessarily follows that unless the state, through its municipal agency, has the right both to exact a license fee for the privilege of engaging in international commerce and to prescribe the rates to be charged therein, this ordinance cannot be sustained. Two questions are thus presented:

First. Has a state municipality the right and power to license a ferry operated by a foreign corporation upon and across navigable international boundary waters; and

Second. As a municipal regulation, can the state municipality prescribe and fix the rates of fare to be charged by the owner for the transportation of persons and property upon such ferry?

The first question has not been definitely answered in the adjudicated cases in the Federal Courts. The doctrine that the power to license ferries and to impose a license fee upon ferry keepers engaged in interstate commerce is a police power which can be exercised by the state and its municipal corporations "Undoubtedly finds support in the opinions announced in *Fanning vs. Gregoire* and *Conway vs. Taylor.*" In *Wiggins Ferry Company vs. East St. Louis,* the court expressly declared that a state has the power "to impose a license fee either directly or through one of its municipal corporations upon the keepers of ferries living in the state for boats owned by them and used in ferrying passengers and goods from a landing in the state across a navigable river to a landing in another state." The following excerpts from the opinion in that case clearly and concisely state the rule there laid down and also its limitations:

> "The levying of a tax upon vessels or other watercraft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs,* is not a regulation of commerce within the meaning of the Constitution of the United States. * * *
>
> "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, power 'to license, tax, and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

The basic principle underlying this decision of the Supreme

Court seems to be that a municipality has the power to tax property located within its limits or to exact a license fee from the owners thereof living within its limits for the privilege of using and employing such property in a *quasi* public service, and that the exercise of such power, when applied to persons engaged in and to instruments employed in interstate commerce, is not an invasion of the exclusive power of Congress to regulate commerce conferred upon it by the Constitution. Thus construed and limited, the *Wiggins Ferry Case* falls far short of sustaining defendants' contention that the City of Sault Ste. Marie, by virtue of its charter powers derived from the State, has the right to exact a license fee from a citizen of a foreign country with the privilege of operating ferry boats, whose *situs* is in such foreign country, in the ferriage of passengers and the property from a private wharf in the defendant City across an international boundary river to a landing upon the opposite shore. By inference at least, the right to exact such license fee is negatived in the following cases where the *Wiggins Ferry* case is cited and construed:

Moran vs. New Orleans, 112 U. S., 69-74;
Pickard vs. Pullman Southern Car Co., 117 U. S., 34-50;
Pullman's Car Co. vs. Pennsylvania, 141 U. S. 18-23.

The *second* question must be answered in the negative upon the authority of *Covington Bridge Company vs. Kentucky*, 154 U. S., 204, in which it was held that the State of Kentucky had no power to fix or regulate tolls upon a bridge over a navigable stream between the States of Ohio and Kentucky. The positive language of the Supreme Court in that case, when applied to the facts in the present case, settles beyond controversy that the City of Sault Ste. Marie has no power to fix rates and charges for the transportation of persons and property upon an international ferry:

"If, as was intimated in that case (*Gloucester Ferry Company vs. Pennsylvania*), interstate commerce means simply

commerce between the States, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced this court to hold in the *Wabash Case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

"With reference to the Second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is moveable and the other is a fixture makes no difference in the application of the rule. * * * While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

"In *Conway vs. Taylor's Executors*, 1 Black, 603 a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that State who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the State. The opinion, however, did not pass upon the question of the right of one State to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such

foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. * * *

"We do hold, however, that the statute of the Commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the State to make. As was said by Mr. Justice Miller in the *Wabash case*: 'It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the State upon the same transportation.' "

It is undoubtedly true that the courts of several of the States, in deliverances both before and since the decision above quoted, have held that the States possess the rights and powers claimed for them by the defendants in the case at bar. It is also true that this doctrine finds slight support in certain *dicta* contained in some of the earlier opinions of the Supreme Court when read and considered apart from their context and when separated from the facts to which they relate. Further comment upon these decisions of the State Court and these expressions of the Federal Court is made unnecessary, if not improper, by the following pertinent statement in the opinion in the *Covington Bridge Case*:

"It is true the States have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates of tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several States. But we are not aware of any case in this court where such right has been recognized."

Neither the State of Michigan nor its municipal corporation, the City of Sault Ste. Marie, has any power or authority to negotiate or treat with the Dominion of Canada with relation to the regulation of commerce between the two countries or the instruments of such commerce. As we said in the case of *Bowman vs. Chicago and Northwestern Ry. Co.*, 125 U. S., 465-482:

"Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our State and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson vs. Mayor of New York*, 92 U. S., 259, 273";

And again in *Crutcher vs. Kentucky*, 141 U. S., 47-57-58:

"It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? and why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. *Inman Steamship Co. vs. Tinker*, 94 U. S. 238. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States and not to the government of the several states; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures."

In this particular instance the regulating acts of the local and subordinate municipalities of the two nations, whether authorized or unauthorized on the part of either, are conflicting and not mutual and reciprocal. The national governments have acted directly and, in the exercise of their treaty making power, have ordained that the navigation of the waters of St.

Mary's River "From main shore to main shore" shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels and boats of both countries equally, subject only to such local laws and regulations as are not inconsistent with such privilege of free navigation. In these respects the present case differs from those cases involving the regulation of bridges or ferries used in interstate commerce, and the intimation contained in the opinions in some of the cases that States by mutual or reciprocal legislation may possibly regulate and fix rates and tolls upon an interstate bridge or ferry has no application and need not be considered or discussed.

Complainant is entitled to the injunction prayed for in all its bill of complaint and a decree will be made accordingly. Complainant will recover its costs to be taxed against the defendant, City of Sault Ste. Marie.

Dated, March 14, 1912.

C. W. SESSIONS,
District Judge

ENDORSED.
No. 228.

THE DISTRICT COURT OF THE UNITED STATES.

FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION.

In Equity.

International Transit Co.

vs.

City of Sault Ste Marie,
et al.

OPINION.

Filed March 14, 1912.
Chas L. Fitch, Deputy Clerk.

UNITED STATES OF AMERICA,
Western District of Michigan,
Northern Division. } ss.:

I, FRED. J. SCHULTHEIS, Deputy Clerk of the District Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division, do hereby certify that I have compared the annexed and foregoing with the original thereof, now on file in my office, and that the same is a true and correct copy of the Opinion, in the matter of *International Transit Company vs. City of Sault Ste. Marie, et al,* and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and duly affixed the seal of the said Court at the City of Marquette, in said District and Division, this twenty-fifth day of March in the year of our Lord one thousand nine hundred and twelve.
(Seal).

FRED J. SCHULTHEIS,
Deputy Clerk.

Office Supreme Court, U. S.
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CLERK.

Supreme Court of the United States

OCTOBER TERM, 1912. No. 50.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error.

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON,

Defendant in Error.

ON ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Brief of Frank Bergen

~~Filed by permission of the Court.~~

for Plaintiff in Error.

(22, 152)

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Supreme Court of the United States.

October Term, 1912. No. 50.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Plaintiff in Error,* *vs.* THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Defendant in Error.*	*On Error to the Supreme Court of the State of New Jersey.*

Brief of Frank Bergen

(Filed by Permission of the Court.)

On the sixth day of July, 1905, the board of chosen freeholders of the county of Hudson, New Jersey, adopted certain resolutions purporting to reduce the rate of fare previously charged by the New York Central and Hudson River Railroad Company for carrying passengers across the Hudson river from Weehawken, in Hudson county, New Jersey, to the city of New York. The same resolutions purport to reduce the rate of fare previously charged by the Port Richmond and Bergen Point Ferry Company for carrying passengers across the Kill von Kull from Port Richmond, Staten Island, New York, to Bayonne, formerly Bergen Point, in Hudson county, New Jersey. Trans. pp. 9-11.

Those resolutions were adopted under the authority of an act of the legislature of New Jersey passed in

1799 to authorize boards of chosen freeholders of the several counties in New Jersey "to fix rates to be taken at the several ferries within their respective counties and the same from time to time to revise, alter, amend or make anew at their discretion." Compiled Statutes of New Jersey, p. 2308, and General Statutes of New Jersey, p. 1469. The act was passed more than ten years after the constitution of the United States was adopted, and does not, on its face, undertake to confer on boards of chosen freeholders power to fix rates to be charged at *interstate* ferries. It refers to ferries *"within their respective counties."* It has been held, however, by the court of errors and appeals of New Jersey in the present case, and in a similar case decided in 1853, that the board of chosen freeholders of Hudson county was authorized by that statute to prescribe the rates that may be charged at the terminus in New Jersey of a ferry operating across the Hudson river from a point in New Jersey to a point in New York; 76 N. J. Law, 664, and 24 N. J. Law, 718.

I shall assume that it is not necessary to argue that the business of carrying passengers and vehicles by a ferry from one state to another for hire is interstate commerce. In the case of *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S., 196, this court said:

> "It matters not that the transportation is made in ferry-boats, which pass between the states every hour of the day. *The means of transportation of persons and freight between the states does not change the character of the business as one of commerce,* nor does the time within which the distance between the states may be traversed. Commerce among the states consists

of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. *The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.*" (p. 203.)

Notwithstanding the decision in the Gloucester case it must still be conceded that no decision of this court has ever held that interstate ferries *per se* can not be regulated in respect of fares by states in which their termini are located. It was, however, pointed out by chief justice Gummere in his dissenting opinion in the present case that such a conclusion has been reached substantially by this court in the Gloucester Ferry Company case and in the Covington Bridge Company case, which on this point may be read together. Trans. page 75. In the Gloucester case, as we have seen, an interstate ferry was held to be an instrument of interstate commerce. In the Covington case, (154 U. S., 204,) it was held that an interstate bridge was an instrument of interstate commerce and that a state could not prescribe the toll for passing over it. The conclusion pointed out by chief justice Gummere seems to be the inevitable consequence of those decisions by this court.

It has been said occasionally that as states may authorize the establishment of interstate ferries and the construction of bridges from one state into another, therefore they may fix the rates or tolls to be charged, especially in the absence of action for that purpose by congress. On that point there are two expressions in the opinions in the Covington case. One appears in the opinion of Mr. Justice Brown on page 219 as follows:

> "Nor does it follow that because a state may authorize a ferry or bridge from its own territory to that of another state it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances, have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized."

The other expression, in which four members of the court concurred, is this:

> "The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the

paramount authority of congress over interstate commerce." page 223.

But in the later case of *St. Clair County* v. *Interstate Transfer Company,* 192 U. S., 454, it was said:

> "We must not be understood as deciding that the doctrine which undoubtedly finds support in the opinions announced in *Fanning* v. *Gregoire* [16 How. 524] and *Conway* v. *Taylor* [1 Black, 603], has not been modified by the rule subsequently laid down in the Gloucester Ferry case and the Covington Bridge case."

If it is still debatable here the question I wish to discuss is this: Did the provision in the constitution of the United States which authorizes congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" *proprio vigore* deprive the states of power to regulate interstate commerce and confer that power on congress exclusively? My contention is that it did; that it was adopted for that purpose; that its meaning as stated above was so understood at the time the constitution was adopted, and that the contemporary interpretation of the commerce clause in that respect has been repeatedly expressed in opinions of this court.

It is conceded, however, that this broad claim should be modified by the statement that the states still have power to affect interstate commerce incidentally or indirectly. But fixing rates is a direct interference with such commerce. The extent of the power of the states in this respect is indicated in the opinion of this court, written by the late Justice Bradley, in *Robbins* v. *Shelby County,* 120 U. S., 489, 492, *post* p. 19.

The question in the present case, and propounded above, was one of the questions argued in the leading

case of *Gibbons* v. *Ogden*, 9 Wheat., 1, decided in 1824. Webster in his argument in that case insisted that by the adoption of the constitution the power to regulate commerce among the states was vested exclusively in congress, and even in the absence of regulation by congress the states could not regulate such commerce. Works, vol. vi, p. 3, ed. 1851. Chief justice Marshall in his opinion stated Webster's position as follows:

> "It has been contended by the counsel for the appellant, that, as the word to 'regulate' implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing; that regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated." p. 209.

The comment of the chief justice on that contention was this:

> "There is great force in this argument, and the court is not satisfied that it has been refuted." *ib.*

In a former part of his opinion the chief justice said:

> "When a state proceeds to regulate commerce with foreign nations, or among the several states, *it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do.* * * * In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is sur-

rendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while congress is regulating it?" p. 200.

The means by which congress, in the opinion of the chief justice, was then regulating commerce among the states was by the laws relating to the coasting trade, and providing for enrolling and issuing licenses for vessels to engage therein. His conclusion was that the acts of the legislature of New York, under which Ogden claimed the exclusive right to navigate steamboats between New York and Elizabethtown, were in conflict with those acts of congress, and therefore void under that provision of the constitution which provides that laws passed in pursuance thereof shall be the supreme law of the land. p. 214.

Referring to an act of congress entitled "An act for the enrolling and licensing of steamboats," the chief justice said:

"This act demonstrates the opinion of congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of

> the union; and the act of a state inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act." p. 221.

Those were evidently the views of all the justices who sat in that case except justice Johnson, who wrote a separate opinion beginning with the statement:

> "The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views." p. 222.

Thereupon he proceeded to state his views, which were substantially those expressed by Webster in his argument, and on which he mainly relied. Justice Johnson conceded, however, that the acts of congress relating to the coasting trade should be allowed considerable influence in sustaining the views of the majority of the court. p. 223.

It is quite certain that the doubt as to the immediate effect of the adoption of the commerce clause observed by this court when considering the case of *Gibbons* v. *Ogden,* did not prevail prior to that time, except perhaps in the state of New York, a state in which the constitution was reluctantly adopted, and it has been completely dissipated since that case was decided. The history of the origin of the interstate commerce clause indicates clearly that the people who adopted the constitution were more eager to deprive the states of power to interfere with interstate and foreign commerce than they were to confer that power

on congress, and they supposed that their purpose had been completely accomplished by the language used in the commerce clause.

In a letter written by Madison to Cabell, February 13, 1829, he said that the power to regulate commerce among the states "was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government, in which alone, however, the remedial power could be lodged." Letters and Writings of Madisor, vol. iv., p. 14. And in a letter to Professor Davis written in 1832 Madison said: "The incapacity of the states separately to regulate their foreign commerce was fully illustrated by an experience which was well known to the federal convention when forming the constitution. It was well known that the incapacity gave a primary and powerful impulse *to the transfer of the power* to a common authority capable of exercising it with effect." *ib.*, p. 247.

If the power to regulate *foreign* commerce was transferred to congress by the constitution, it cannot be denied that power to regulate *interstate* commerce was also transferred at the same time. The transfer to congress of power to regulate commere with foreign nations and among the several states and with the Indian tribes, was effected by the same clause of the constitution, if effected at all. No state has succeeded in any direct attempt to regulate commerce with foreign nations since the constitution was adopted, because: "In regard to foreign nations, it is universally admitted that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this

country and another, to which they do not extend. Commerce, as used in the constitution, is a unit, every part of which is indicated by the term. *If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence.* The next words are, 'among the several states.'" Story on the Const., sec. 1065.

That statement of Story in his Commentaries has been affirmed by this court in *Crutcher* v. *Kentucky*, 141 U. S., 47, at pp. 57 & 58:

> *"It has frequently been laid down by this court that the power of congress over interstate commerce is as absolute as it is over foreign commerce.* Would any one pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co.* v. *Tinker*, 94 U. S., 238. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states; and confidence in that regard may be reposed in the

national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. *And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. Telegraph Co.* v. *Texas,* 105 U. S., 460; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S., 196, 205, 211; *Phila. Steamship Co.* v. *Pennsylvania,* 122 U. S., 326, 342; *McCall* v. *California,* 136 U. S., 104, 110; *Norfolk & Western Railroad* v. *Pennsylvania,* 136 U. S., 114, 118."

Western Union Telegraph Co. v. *Kansas,* 216 U. S., 1, also distinctly holds *inter alia* that the power of congress over interstate commerce is as absolute as it is over foreign commerce, following with approval the case of *Crutcher* v. *Kentucky.*

The origin of the constitution of the United States may be found in the conflicting and vexatious laws of the states affecting interstate commerce, passed after they had achieved their independence. "To examine the relative situation and trade of the states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and permanent harmony, and to report to the several states such an act as, when unanimously ratified by them, will enable the United States in congress assembled effectually to provide for the same," are the essential words, and the declared object, of the famous resolution adopted by the legislature of Virginia in January, 1786, which led to the convention at Annapolis in September following, and afterwards to the convention held at Philadelphia in 1787 which

framed the federal constitution. Curtis' Const. Hist. U. S., vol. 1, p. 231 note. Elliot's Debates, vol. 1, p. 115, ed. 1876.

New Jersey was one of the five states represented at Annapolis, the second state to appoint delegates to the convention at Philadelphia, and the third state to adopt the constitution. Mulford's Hist. N. J., p. 484; Bancroft's History of the Constitution, vol. 1, p. 252. The principal reason for the prompt and rapid action of that state is expressed briefly by Bancroft at p. 256. It was this:—The people had been much annoyed by state laws purporting to regulate interstate and foreign commerce and they believed that the commerce clause of the federal constitution would nullify forever the power of the states to enact such laws.

Webster's profound knowledge of the origin of the constitution was one of the sources of his unequaled power to expound it. The foundations of his great constitutional arguments are historic facts. In his argument in *Gibbons* v. *Ogden* he said:

> "Few things are better known than the immediate causes which led to the adoption of the present constitution; and there is nothing, as I think, clearer than that the prevailing motive was *to regulate commerce;* to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law. * * * In the history of the times, it is accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve

these was a great object in itself; and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New Jersey resolutions [1 Laws U. S., p. 28, Bioren and Duane's ed.] complain that the regulation of trade was in the power of the several states, within their separate jurisdiction, to such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that the sole and exclusive power of regulating trade with foreign states ought to be in congress. Mr. Witherspoon's motion in congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that congress ought to possess the *sole and exclusive power of regulating trade, as well with foreign nations as between the states.* [1 Laws U. S., p. 50.] The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The sole purpose for which the delegates assembled at Annapolis was to devise means for the uniform regulation of trade. They found no means but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the neces-

sities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. * * * *We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the states. The very object intended, more than any other, was to take away such power.* If it had not so provided, the constitution would not have been worth accepting." Works, vol. vi, p. 9.

Three years after the decision of *Gibbons* v. *Ogden* chief justice Marshall in his opinion in the case of *Brown* v. *Maryland*, 12 Wheat., p. 419, said at p. 445:

"The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which in-

troduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce *and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.*"

There is a fact stated in the opinion of Justice Johnson in the case of *Gibbons* v. *Ogden*, which appears to demonstrate that it was the purpose of the commerce clause to transfer *all power* to regulate interstate and foreign commerce from the state legislatures to congress, and that the adoption of the constitution *ipso facto* accomplished that purpose, and also abrogated the regulations in force at that time which the states had prescribed. The statement is as follows:

"There was not a state in the union in which there did not, at that time [when the federal constitution was adopted], exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the union. But where was the existing statute on this subject, that a state attempted to execute [after the adoption of the constitution]? or by what state was it ever thought necessary to repeal those statutes? *By common consent those laws dropped lifeless from their statute books, for want of the sustaining power that had been relinquished to congress.*" (p. 226.)

Similar information might be collected from other sources but it would seem to be unnecessary to do so.

If the Hudson freeholders had power to adopt the present resolutions reducing the fare from five to three cents for carrying passengers between New Jersey and New York they also had, and still have, power to raise the rate to ten cents or one dollar or any other sum and to discriminate among persons and corporations operating ferries between those states, and *so accomplish the very thing which this court in Gibbons* v. *Ogden unanimously held to be impossible under the federal constitution.*

> "If the power [to regulate interstate commerce] exists in the states, it may be carried to any extent they may choose. If it does not exist, every exercise of it is, *pro tanto,* a violation of the power of congress to regulate commerce." Story on the Const., sec. 1072.

From what so far appears I believe the following conclusions may be safely drawn:

(1) The primary and one of the principal objects for which the federal constitution was adopted, and the government of the United States created, was to deprive the states of power to regulate interstate and foreign commerce, and to confer that power on congress exclusively.

(2) The commerce clause of the constitution accomplished that object *proprio vigore,* and that was the common understanding and the contemporaneous interpretation of its meaning at the time and for many years after the constitution was adopted.

(3) Existing regulations by the states of interstate and foreign commerce were abrogated when the constitution was adopted, *ipso facto.*

(4) In the case of *Gibbons* v. *Ogden* it was held that when congress has undertaken to regulate interstate commerce inconsistent state laws subsequently enacted are void as far as inconsistent.

(5) The opinions filed in that case indicate that the power to regulate interstate commerce is possessed exclusively by congress, that the states cannot exercise that power in the absence of action by congress, and that an authoritative decision to that effect would probably be made in a proper case.

In view of the fact that the defendant in error attempts to distinguish between ferries and other means of interstate commerce, and insists that ferries are excepted from the commerce clause, it may be helpful to call attention to the fact that the great case of *Gibbons* v. *Ogden* grew out of the operation by Gibbons of a *ferry* between Elizabethtown (now the city of Elizabeth, which includes Elizabeth Port) in New Jersey and the city of New York. If the commerce clause of the constitution did not include interstate ferries within the scope of its operation this court would not have had jurisdiction of the case.

The distance by water between the southerly end of Manhattan Island and Elizabeth Port is about twelve miles, but that distance did not deprive the business carried on by Gibbons of the character of a ferry. In the case of *Mayor, &c., of New York* v. *The New Jersey Steamboat Navigation Company*, 106 N. Y., 28, it appeared that the company was operating a ferry between a point on Manhattan Island and Elizabeth Port in New Jersey, stopping *en route* at three points on Staten Island. It was alleged that the ferry so far as it operated between Manhattan Island

and points on Staten Island (both of which are in the state of New York) was an invasion of the exclusive right of the city to operate or license the operation of ferries between points on Manhattan Island and other points in the state of New York opposite Manhattan Island. The New York court of appeals said:

> "The ferry operated by the New Jersey Steamboat Transportation Company started from the same pier in the city [as the boats licensed by the city], and ran thence to the city of Bayonne in the state of New Jersey, on the north shore of the Kill von Kull, thence to West Brighton, thence to Port Richmond, thence to Elm Park [on Staten Island], and thence to Elizabeth Port, New Jersey; then it returned, stopping at the same places, to the same pier, the round trip being about twenty-four miles. * * * The distance of Elm Park, or even of Elizabeth Port, from the city is not so great that a ferry could not be established and operated between it and the city. Ferries to Elizabeth Port have been operated and known as ferries for more than one hundred years, and it appears never to have been doubted that ferries could be operated between the two places.
>
> "It is impossible, in a general way, to specify to what distance, over intervening waters, ferries may be operated. A ferry could not be established between New York and Boston or New York and Newport or Philadelphia. The distance would be too great and the business of transporting passengers and freight between such distant places would be that of common carriers upon public waters. But when the intervening waters are not wide and can be traversed at regular and

brief intervals by boats adapted to a ferry business, there can be no question that ferries may be established and operated."

It is true that not much was said in the argument, or in the opinions filed in *Gibbons* v. *Ogden,* as to the character of the business in which Gibbons was engaged, that is, whether he was acting as a common carrier upon public waters, transporting passengers and merchandise for long distances, or was simply engaged in carrying passengers and merchandise accompanied by its owners for short distances across streams or small bodies of water that might be traversed in a few minutes or a few hours; but as Gibbons was undoubtedly engaged in carrying on a ferry business, that fact must have been well known to the very able counsel who argued the case, and if there was any reason to suppose that the commerce clause of the constitution did not apply to ferries that fact no doubt would have been interposed as a defence to Ogden's application for an injunction.

The following cases, decided since the decision of *Gibbons* v. *Ogden,* hold that "the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is possessed exclusively by congress, and cannot be exercised by the states, even in the absence of action by congress. It will be seen that the federal courts, following one of the most important canons for construing *lex scripta,* have viewed the remedy provided by the commerce clause of the constitution in the light of the older laws and their mischief.

In the case of *Robbins* v. *Shelby County Taxing District,* 120 U. S., 489, the late justice Bradley, writing the court's opinion, states (p. 492):

"1. The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How., 299, 319, and was virtually involved in the case of *Gibbons* v. *Ogden,* 9 Wheat., 1, and has been confirmed in many subsequent cases, amongst others in *Brown* v. *Maryland,* 12 Wheat., 419; *The Passenger Cases,* 7 How., 283; *Crandall* v. *Nevada,* 6 Wall., 35, 42; *Ward* v. *Maryland,* 12 Wall., 418, 430; *State Freight Tax Cases,* 15 Wall., 232, 279; *Henderson* v. *Mayor of New York,* 92 U. S., 259, 272; *Railroad Co.* v. *Husen,* 95 U. S., 465, 469; *Mobile* v. *Kimball,* 102 U. S., 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S., 196, 203; *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S., 557.

"2. Another established doctrine of this court is, that where the power of congress to regulate is exclusive the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden,* 9 Wheat., 1, 222, by Mr. Justice Grier in the *Passenger Cases,* 7 How., 283, 462, and has been affirmed in subsequent cases. *State Freight Tax Cases,* 15 Wall., 232,

279; *Railroad Co.* v. *Husen*, 95 U. S., 465, 469; *Welton* v. *Missouri*, 91 U. S., 275, 282; *Mobile* v. *Kimball*, 102 U. S., 691, 697; *Brown* v. *Houston*, 114 U. S., 622, 631; *Walling* v. *Michigan*, 116 U. S., 446, 455; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34; *Wabash, &c., Railway Co.* v. *Illinois*, 118 U. S., 557.

"3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under the authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But

in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; *and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to congress over the subject.* For authorities on this last head it is only necessary to refer to those already cited.

"In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. *The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject.*"

It is true that for nearly a hundred years after the adoption of the federal constitution, or prior to 1885, states established and licensed interstate ferries, and to some extent protected their franchises and regulated their business. During that time the extent of the states' power to do so was occasionally considered by this court and sometimes sustained. Since 1884 the views of this court previously expressed have been somewhat modified with the development of the com-

merce clause of the constitution. The cases are collected and examined in the opinion under review and in the opinion of the supreme court of New Jersey in this case, 74 N. J. Law, p. 367. This court, however, was not called upon in any of those cases to pass judgment on an effort of a state to prescribe rates to be charged for carrying passengers *by means of a ferry* from one state to another.

It is also true that states may incidentally regulate interstate commerce by virtue of the police power, and prescribing rates for public service is exercising the police power. The difficulty is to distinguish between incidental and harmless regulation by states and regulation that may embarrass or possibly prohibit commerce among the states. This distinction is illustrated in the quotation already made from the case of *Robbins* v. *Shelby County Taxing District, supra*, p. 19.

Suppose as a further illustration that the legislature of New York many years ago had created a corporation by special act with authority to establish and operate a ferry between a point in that state and a point in Hudson county, New Jersey, and that the special act had prescribed rates that might be charged for carrying passengers, vehicles and cattle—fixing the rate for a single person at six cents—and the freeholders of Hudson county had fixed a rate of three cents for a single passenger and directed the corporation to sell a return or round trip ticket for six cents. According to the judgment under review a person who had purchased a return ticket in New Jersey must be carried to New York, and the corporation perhaps would be obliged to honor the return coupon when presented at the ferry house in New York; that is, the company might charge only three cents to carry a

passenger in one direction between the termini of its ferry, but could exact six cents to bring him back, unless he had a return coupon for which he had paid the lawful rate where he bought it, although that rate was but half of the lawful rate where the coupon was used. It may be permissible to say that the case supposed is a condition that actually exists, and was brought about by the orders now in question, except that the corporation referred to charges in fact less for carrying passengers than is authorized by the legislature of New York, and more than is permitted by the resolutions of the Hudson freeholders.

Different views have been expressed by the courts as to the character of a ferry as an instrument of interstate commerce, and from those views different conclusions have been drawn as to the extent of the control of states over interstate ferries. The decisions of this court, however, have proceeded far enough to make it safe to assert that a ferry establishment with one landing in one state and another landing in another state is an instrument of interstate commerce; that the business of transferring passengers by such a ferry is interstate commerce; that a proceeding to fix rates for such service is a regulation of interstate commerce, and that such regulation is not permissible by the reserved police power of the states over interstate commerce.

It will be evident from reading the opinion of the New Jersey court of errors and appeals in the present case that the judges who voted to reverse the judgment of the supreme court of that state and to sustain the resolutions of the freeholders of Hudson county, now under review, felt constrained to do so because of the decision rendered in 1853 in the case of *Chosen Free-*

holders of Hudson County v. *State*, reported in 24 New Jersey Law, p. 718, in which the question now under discussion was involved. After reviewing the decisions of this court relating to the subject, the court of errors in its present opinion remarked:

> *"It may be admitted that the logical inferences to be deduced from the later federal decisions, are in favor of the view that when the precise question arises in the federal tribunal, it will be held that the right to regulate tolls for the use of a ferry, like the one in question, resides alone in congress; and if the present question were new in this state, the line of reasoning in the learned opinion delivered in our supreme court in this case would be strongly in that direction. But in the face of the adjudication in our court of last resort, made over fifty years ago, I think we should take no step in that direction beyond that taken by the federal court in actual decisions."* (Trans. page 68.)

The case of the *State* v. *Hudson Freeholders*, decided by the New Jersey court of errors and appeals in 1853, seems to have been disposed of within a narrow range of discussion. It may be conceded that discordant legislation relating to ferries was not a grievance that caused much complaint prior to the adoption of the federal constitution; but, nevertheless, the effort to show that the power to regulate commerce which the states had transferred to congress did not include exclusive control over interstate ferries is not convincing. Indeed, it is far from it. The remark of chief justice Marshall in the *Gibbons* case, p. 203 of 9 Wheaton, referred to by justice Carpenter in 23 N. J. L. Rep., at p. 208, and by justice Elmer in 24 N. J. L. Rep., at p. 728, to sustain their opinions, is but

a frail support for such a conclusion. The current of Marshall's opinion runs strongly against it. The misapprehension of his remark by Justices Carpenter and Elmer is pointed out and corrected in *Gloucester Ferry Co.* v. *Pennsylvania, supra.*, at page 215.

It is not deemed necessary to enter upon a consideration of the extent of the authority of the states to regulate interstate commerce in matters that may be regulated by congress but have not been so regulated at the time the states take action, nor to consider the extent that the states under their police power may incidentally regulate interstate commerce, for the reason that it has been definitely settled that the fixing of rates by states for transporting passengers or merchandise from a point in one state to a point in another is unlawful, even though congress has taken no action on that subject. In the case of *Wabash, etc. Ry. Co.* v. *Illinois,* 118 U. S., 557, after reviewing the authorities at considerable length, in an opinion written by the late justice Miller, it was declared:

> "This court holds now, and has never consciously held otherwise, that a statute of a state, intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one state to another, *is not within that class of legislation which the states may enact in the absence of legislation by congress;* and that such statutes are void even as to that part of such transmission which may be within the state." (5th syl.)

The extent of the power of the states to regulate interstate commerce is fully examined in the case of

Pickard v. *Pullman Southern Car Company*, 117 U. S., 34, and in *Cleveland, etc. Ry. Co.* v. *Illinois*, 177 U. S., 514, but the case now under consideration does not fall within any definition of the reserved powers of the states recognized in those cases.

In the opinion in the Wabash case, *supra*, at page 575, the following statement was quoted from the opinion in the *Gloucester Ferry Company* case:

> "It needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation."

And after referring to other cases it was said:

> *"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law."*

A discussion of the power of the states to regulate interstate ferries in the absence of action for that purpose by congress would also seem to be unnecessary, because congress has created a commission to supervise interstate commerce, and has extended its jurisdiction over ferries operated in connection with railroads, and the ferries of the plaintiff in error are operated in connection with its railroad. It may be admitted that the interstate commerce commission has taken no action in respect to the rates formerly charged by the plaintiff in error; but that fact does not diminish its exclusive

power to take such action when deemed necessary. Besides, congress has otherwise undertaken to regulate interstate ferries. Section 2792 of the compiled statutes of the United States is as follows:

> "Vessels used exclusively as *ferry-boats* carrying passengers, baggage and merchandise, shall not be required to enter and clear, nor shall the masters of such vessels be required to present manifests or to pay entrance or clearance fees, or fees for receiving or certifying manifests, but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs according to law."

That section evidently relates to ferries between points in Canada and Mexico and the United States. But section 4426 applies to *all* ferry-boats, and is as follows:

> "The hull and boilers of every ferry-boat, canal-boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life, as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted; and no such vessel shall be navigated without a licensed engineer and a licensed pilot. Provided, however, that in open steam-launches of ten tons burden and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer."

Moreover, much of the voluminous legislation of congress regulating navigation applies to ferryboats as well as to craft engaged in the coasting trade.

Section 4400 of the compiled statutes—one of the sections relating to the regulation of steam vessels—states that: *"All steam vessels* navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title [LII];" and then follow sixty-two sections regulating the vessels referred to in section 4400, and providing among other things for licensing their captains, mates, engineers, pilots, &c.; especially sections 4439-4442. These statutes not only show that congress has undertaken to regulate ferry-boats engaged in commerce, but they also indicate the will of congress that no other regulations shall be made until congress decides to take further action. On this point the authorities appear to be conclusive. Even, therefore, if it be true that states may regulate interstate commerce in the absence of action by congress, that condition does not exist in the present instance.

It may be insisted by the defendant in error that although congress has undertaken to regulate interstate ferries in some respects, the states may still regulate such ferries in all other respects until congress or the interstate commerce commission shall have taken further action regulating such ferries in *all possible respects.* Such a view would lead to the condition that prevailed in 1787 and assumes that the interstate commerce commission by its orders and rulings can repeal, amend or suspend acts of the legislatures of the states regulating interstate commerce.

There are one or two passages in the case of *Hall* v. *De Cuir*, 95 U. S., 485, 488, which are so relevant to this aspect of the present discussion that I will quote them at length:

> "We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.
>
> "It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a mat-

ter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It is therefore respectfully submitted:

(1) That the power to directly regulate commerce among the states, including whatever power the states previously had to prescribe rates for interstate commerce, whether by virtue of their police power or otherwise, was transferred to the United States by the adoption of the commerce clause of the constitution,

and can only be exercised by or with the authority of congress.

(2) That ferries with their landings or termini in different states are instruments of interstate commerce.

(3) That congress, by direct legislation, and by extending the jurisdiction of the interstate commerce commission, has regulated interstate ferries to the extent that regulation, in the judgment of congress, is necessary or desirable at present. The states have no power to supplement those regulations, it being presumed conclusively that in the particulars in which congress has omitted to regulate interstate ferries, there shall be no regulation until congress shall decide to take further action.

(4) That the resolutions in question in this case constitute an effort by the defendant in error, under the alleged authority of a statute of New Jersey passed in 1799, to regulate interstate commerce directly and in an essential particular, and are therefore illegal and void.

(5) That the judgment under review should be reversed and the resolutions therein referred to should be set aside.

FRANK BERGEN,

~~Amicus Curiae.~~

for Plaintiff in Error.

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FILED.
JAN 6 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 50.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FILED BY LEAVE OF COURT.

HENRY E. BODMAN,
Amicus Curiæ.

ALEXIS C. ANGELL,
Of Counsel.

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Statement.

In the case of International Transit Company *vs.* City of Sault Ste. Marie *et al.*, No. 749, October, 1912, term, the question of the exclusive power of the Federal Government over commerce, argued in this case, is presented in a somewhat different aspect. The two cases are, however, sufficiently alike so that a decision in this case ought, we believe, to be arrived at in view of the possible effect of any principle which may be laid down when applied to the situation presented in the Transit Company case.

In the International Transit Company Case (No. 794) the captain of a steamer owned by the International Transit Company, a Canadian corporation, was arrested, tried, and convicted before a justice of the peace in the city of Sault Ste. Marie, Michigan, and sentenced to pay a fine, under penalty of imprisonment, for violation of a city ordinance forbidding the operation of a ferry from the Michigan shore to the Canadian shore without a license from the city, to be obtained only upon payment of a license fee, such license to contain regulations fixing the rates of fare from the Michigan to the Canadian shore prescribing the hours of departure and the season of the year during which the steamer should be operated, etc. The Transit Company had previously obtained a license from the Dominion of Canada authorizing the operation of such ferry, and had for several years been operating its steamers thereunder. This Canadian license conflicts with the license required by the city of Sault Ste. Marie in almost every important particular, notably in the rate of fare which might be charged, the hours of service, and the season of operation.

The Transit Company cannot comply with both licenses.

It is also claimed that the municipal ordinance violates the treaty between Great Britain and the United States ratified in 1910, whereby it was agreed that these boundary waters should be free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally.

We have set forth only sufficient of the facts in the Transit Company case to show what must at once be apparent, viz., that any definition in this case of "Commerce" so as to exclude transportation by ferries over interstate streams, or any holding that interstate ferries are matters for State regulation, as contended for by defendant in error, will at once lead to complications respecting international boundary streams by opening the door to possible conflicts with foreign nations, violation of treaty rights, etc., through the adoption and enforcement of local ordinances by any city, village, or hamlet along our international water boundary.

This is

> "in an eminent degree a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule" (regulating such commerce) "be established by treaty or by legislation." Henderson *vs.* Mayor of New York, 92 U. S., 259 (pp. 272-273).

ARGUMENT.

Several points made in the brief for defendant in error merit attention and are apparently not replied to by opposing counsel.

Were the Gloucester Ferry vs. Covington cases decided as a result of a misconstruction of the language of Gibbons vs. Ogden respecting ferries?

Argument in support of State power over interstate ferries is customarily based upon *Conway vs. Taylor* (Black. 603) and *Fanning vs. Gregoire* (16 How., 524). These cases were not followed in the *Gloucester Ferry case* or the *Covington Bridge case;* Mr. Justice Field stating (in the Gloucester case, 114 U. S., p. 215) that they were decided *upon a mistaken construction given to the language of Chief Justice Marshall in Gibbons vs. Ogden,* where it was said that "laws respecting ferries as well as inspection laws, etc.," were matters for State control. Mr. Justice Field was of opinion that the court was plainly referring to *intrastate ferries* (114 U. S., pp. 215-216).

Counsel for defendant in error (p. 39) argue that to suppose the court in the Gloucester Ferry case interpreted Chief Justice Marshall as supporting State power *only on intrastate streams "would be a complete misunderstanding"* of both cases, and that *"a solution of this apparent contradiction will be found the means of reconciling all authorities*

on the subject." Anything that will reconcile *all* authorities on the subject is certainly much to be desired.

The assumption that Chief Justice Marshall was referring in the statement in question *to interstate ferries* constitutes such an important basis of counsel's argument that we specially invite the court's attention to the following:

It is claimed by counsel that Chief Justice Marshall in making this statement was following Webster's argument, "that Congress had no authority to regulate ferries upon boundary streams." Webster's argument upon the question is found on pages 18 to 20, 9th Wheaton. He, of course, nowhere uses the exact language above quoted, and a careful examination of the report of this case will show, we believe, that Webster made no such contention.

To demonstrate that Webster and Chief Justice Marshall, following him, conceded the power of the States over interstate ferries (contrary to the supposition in Gloucester Ferry Case), counsel for defendant in error argue (p. 40) that Mr. Emmett had claimed that the power over Congress was concurrent, and had cited a number of St[illegible] statutes regulating interstate ferries; and that "Webster, *in answer to this proposition,*" contended that Mr. Emmett's illustrations proved nothing, because laws respecting ferries were not "commercial regulations," but matters of local police. It becomes a matter of some importance, therefore, to ascertain who it was that Webster was replying to and what contention he was endeavoring to refute.

We submit that in stating that ferry laws were not "commercial regulations" Webster was not replying to Mr. Emmett's argument, above referred to, and that he was *not* referring to interstate ferries.

The following is the basis for this suggestion:

First. Mr. Emmett, in citing the State laws affecting interstate stage-lines, ferries, etc., was contending, not that ferry regulations were matters of local commerce, but that *transportation of passengers* (*e. g.*, on stage-lines, steamboats, and ferries) *was not commerce at all.*

He maintained that:

"Neither does the case present any ground on which the application of the clause (of the Federal Constitution) respecting commerce can be made; the vessels *not having been engaged in trade or commerce, but in carrying passengers for hire*" (pp. 84–85).

* * * "the power of Congress could only be extended to fair cases of trading, * * * and not to the mere transportation of passengers * * * This distinction is, in itself, of great consequence, and peculiarly applicable to the case before the court, in which the complainant states and the defendant admits the *vessels to have been employed in the transportation of passengers*" (9 Wheaton, p. 89).

"It could not, I think, be seriously contended that Congress can regulate the carrying of passengers from any part of the Union who are traveling to Ballston, Saratoga, or any other place for health or pleasure. * * * That falls within the sphere of State legislation."

(Note here that Mr. Emmett was not arguing that transportation by *ferries* constituted an exception to the rule that Congress was to regulate interstate commerce, but that interstate passenger traffic was not commerce.)

Mr. Emmett continued:

"Those who contend that navigating by steamboats between different States falls within the powers of Congress, must admit that it would have the power to prohibit the carrying of goods, wares, and merchandise in a steamboat from any foreign place or different State to another. Now, would Congress have power to prohibit the carrying of passengers in steamboats from Norfolk or Elizabethtown to New York? Certainly such power could not be contended for; and why not? *Only because the powers of Congress have nothing to do with the carrying of passengers.*" (Pages 95-96.)

After some further argument along this line, Mr. Emmett said:

> "The States have always legislated on a different principle, whether the conveyance of passengers was to be by land or by water. Every State has probably made numerous provisions on this subject;"

and he then cited the State laws respecting stage coaches and ferries (p. 97).

His contention was that "commerce" meant trade, the exchange and transportation of commodities, etc., and as proof of this he cited the State laws referred to as showing the practical construction of the term "commerce" *not to include passenger transportation.*

Mr. Emmett, in citing these State laws, was not, therefore, contending that ferry regulations were matters of internal commerce or local police over which Congress had no power, but that *passenger traffic was not commerce at all,* and that therefore Congress had no jurisdiction as to such traffic, interstate or otherwise.

Second. Mr. Oakley, on the other hand, contended (pp. 64-65) that the power to regulate commerce was concurrent, and in support referred to the enactment of State laws affecting *the internal trade* of the States, *including turnpike roads, toll bridges, stage wagons, ferries over navigable rivers and lakes.* He was referring to the *internal* commerce of a State, which, in the same paragraph, he thus defines:

> "Internal commerce must be that which is wholly carried on within the limits of a State, as where the commencement, progress, and termination of the voyage are wholly confined to the territory of the State."
>
> "All such laws," continued Mr. Oakley (*i. e.*, affecting roads, bridges, ferries, etc., wholly within a State), "must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power *does not reach the regulation of internal trade,*" etc.

It is clear that Mr. Oakley was referring to internal trade as defined by him, that is, purely intrastate, and to ferries and bridges that were intrastate.

A comparison of this argument with Webster's will show that it was *to this argument* that Webster replied as follows:

> "The argument alleges, that the States have a concurrent power with Congress, of regulating commerce; and its proof of this position is, that the States have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the State itself, but also commerce between different States. Therefore, as all these are *commercial regulations,* and are yet acknowledged to be rightfully established by the States, it follows, as is supposed, that the States must have a concurrent power to regulate commerce.
>
> "Now, what was the inevitable consequence of this mode of reasoning? Does it not admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the Constitution, then, certainly, Congress having a concurrent power to regulate commerce, *may establish ferries, turnpikes, bridges, &c., and provide for all this detail of interior legislation.* To sustain the interference of the State, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress, over a vast scope of *internal legislation, which no one has heretofore supposed to be within its powers.*" (Webster was here certainly referring to legislation upon purely intrastate subjects.) "But this is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequences would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; a consequence, which no one would admit for a moment. The truth was, he thought, that all these things were, in their gen-

eral character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed, might be a matter of great commercial concern. In many cases it is so; and when it is so, he thought there was no doubt of the power of Congress to make it. But generally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations.*"

Chief Justice Marshall followed the same idea in his opinion:

> "It is not intended to say that these words (commerce among the several States) comprehend that commerce *which is completely internal,* which is carried on between man and man in a State, * * * and which does not extend to other States" (p. 194). "The completely internal commerce of a State, then, may be considered as reserved for the State itself" (p. 95) (implying that commerce not *completely internal* had not been reserved).
>
> "They" (inspection laws) "form a portion of that immense mass of legislation which embraces everything *within the territory of a State* not surrendered to the General Government. * * * Inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating *the internal commerce of a State* and those which respect turnpike roads, ferries, &c., are component parts of this mass."

Clearly, Chief Justice Marshall was referring to subjects that concerned the purely internal commerce of a State—as previously defined by him.

Third. As further proof that *Gibbons vs. Ogden* did not concede control of interstate ferries to the States, attention is called to the fact that the State law in that case was stricken down *in face of the argument that Livingston and Fulton's license was merely an interstate ferry license.*

> "Is it" (respondent's license) "in truth anything more than *an exclusive right of ferry over the waters of Hudson's River?*" (Argument of Mr. Oakley, p. 75.)

We submit, therefore, that Mr. Justice Field in the Gloucester Ferry case and Mr. Justice Brown in the Covington case were not mistaken in their construction of *Gibbons vs. Ogden,* and the numerous cases decided by this court on their authority have not all proceeded upon a fundamental misconception of what was there decided.

Character of Ferriage as Commerce.

It is urged upon this court that transportation for the distance of a mile or so, even though conducted upon a boundary stream, when considered solely in relation to the residents of the neighborhood, is not a subject of national concern, etc. This argument is illustrated by referring to the ferry service in and about New York. Was not this matter definitely settled when this court said:

> "It matters not that the transportation is made in ferry boats which pass between States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the State may be traversed."
>
> "And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone can deal with such transportation." (Gloucester Ferry case, 114 U. S., 196.)

This language is quoted with approval in the Covington Bridge case, where the court said:

> "The thousands of people who daily pass and repass on this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

See, also, *Lottery* case, 188 U. S., 352.

In the *Henderson Bridge case,* 166 U. S., 150, a tax on the value of a bridge franchise across the Ohio river, fixed on the basis of gross earnings, was sustained not as a tax on the business of interstate commerce, but on the franchise granted by the State, as being intangible property situated within the State. Even this indirect approach to regulation of interstate commerce did not meet the approval of the entire court. Mr. Justice White, with the concurrence of three other justices, filed a dissenting opinion, holding that the Gloucester Ferry and Covington Bridge cases precluded such a tax, saying:

> "I consider it a new and startling doctrine to say that a bridge which is situated in two States, with the sanction of the laws of both, which has been made a post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business are not receipts derived from interstate commerce business. Pushed to its legitimate conclusion, this premise deprives the interstate commerce clause of the Constitution of its entire efficacy, and is, I think, in direct conflict with the Constitution as interpreted by this court from the foundation of the Government."

That the commerce clause includes transportation by ferry is stated in a recent opinion by Mr. Chief Justice White, who said, referring to the Employers' Liability act:

> "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leaves no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind whether steam or sail, *ferries,* bridge, wagon lines, carriages, trolley lines, etc."
>
> *Employers' Liability Cases,* 207 U. S., 463 (497).

This decision is cited by the Commerce Court in a very recent case, *Omaha & C. B. St. Ry. vs. Interstate Commerce Commission,* 191 Fed., 40, in which the Interstate Commerce Commission was held to have jurisdiction of the fares on a city street railway line over a bridge across the Missouri river between Omaha and Council Bluffs.

The two cases usually cited to sustain the power of the States are *Conway vs. Taylor* and *Fanning vs. Gregoire,* (*supra*).

In *Fanning vs. Gregoire* suit was brought by the owner of a ferry claiming an exclusive license from a State to enjoin the operation of a ferry under a city license. As the State license was held not to be exclusive, there was no occasion to consider the validity of the State grant. The statement that the States retained power to grant ferry licenses was not necessary to a decision of the case.

In *Conway vs. Taylor* it was said (1 Black, p. 634):

> "Undoubtedly, the States, in conferring ferry rights may pass laws so infringing the commercial power of the Nation that it would be the duty of this court to annul or control them."

This suggestion was noted as significant in the case of *St. Clair vs. Transfer Co.,* 192 U. S., 454.

In the *Covington Bridge case* (p. 217) the court quotes from the opinion of Mr. Justice Miller in the *Wabash case* (118 U. S., 557), giving as the substance thereof

> "that if the prior cases were to be considered as laying down the principle that the States might regulate the charges of interstate traffic, *they must be considered as overruled.*"

Counsel for defendant in error contend that this court has expressly recognized *Fanning vs. Gregoire* as correctly stating the law with respect to the power of States over ferries across interstate streams by citing it in *Williams vs. Wing,* 177 U. S., at p. 603.

A mere glance at this latter case will show that no such question was involved. *Fanning vs. Gregoire* was said to be "in point and decisive" upon the question whether the grant of a ferry franchise by a State constituted a contract, forbidding future grants to others.

Conway vs. Taylor is said to have been recognized and approved in *Louisville Ferry Co. vs. Kentucky*, 188 U. S., at p. 394. In the latter case this court referred to *Conway vs. Taylor* as one of the cases where the court had recognized the principle that a ferry franchise from one State is distinct from a similar franchise from an adjacent State.

The question at issue was the situs for taxation of an Indiana ferry franchise. The question whether an effort to tax such a franchise constituted an interference with interstate commerce was not decided.

Counsel for defendant in error (p. 59) state that the State right to license ferries appears to be admitted in the Covington Bridge case and argue that the right to license includes the right to fix tolls.

It was pointed out in the Covington Bridge case that

> "it does not follow that because a State may authorize a ferry or bridge from its own territory to another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges * * * to and from such foreign ports would not be a regulation of commerce."

It is strenuously urged that the assertion of the exclusive power of Congress over interstate ferries will overthrow many State laws upon this subject.

It by no means follows that local communities will be without relief in the absence of local regulations. This is pointed out in the Gloucester Ferry case. Rates of ferriage over interstate streams must at common law be reasonable. On the other hand Congress has ample power to provide for

the regulation of ferry rates upon boundary streams with due regard to local conditions either through the Interstate Commerce Commission or some of the Federal departments, boards or officers. The Federal Government has successfully assumed the administration of other local duties much more varied, as in the improvement and regulation of rivers and harbors throughout the country.

The argument of convenience has been presented many times when the limitations of the commerce clause have been under discussion. Compared with many other fields of legislation which have been held to be within the exclusive power of the Federal Government, the regulation of ferries seems comparatively unimportant.

Whatever inconveniences real or fancied may be urged against Federal control of this subject are they not overbalanced by the results of leaving the entire subject interstate and international in the keeping of local municipalities?

May a city or village legislate with reference to ferries over international streams?

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a State legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. *Inman Steamship Co. vs. Tinker*, 94 U. S., 238."

Crutcher *vs.* Kentucky, 141 U. S., 47 (57, 58).

If local cities, villages, and hamlets may license international ferries and exclude others not licensed, may impose fees for the granting of such privilege, this branch of international commerce is not free. What would prevent these municipalities from excluding foreign applicants for a license altogether, or by the imposition of discriminating license fees or different rates of toll, create conditions so unequal as to work a practical exclusion?

Nor is the contention sound that a State may regulate and license ferries for transportation of passengers from its own shore to the shore of another State or country. If transportation by ferry across a boundary stream is commerce, it is equally so in either direction.

These considerations and others which readily suggest themselves emphasize the importance of adhering to the rule already laid down by this court that transportation by ferries is commerce and that the regulation of tolls upon an interstate bridge (and upon ferries which have been held to be practically the same thing) is an interference with interstate commerce.

We submit that when considered with reference to foreign commerce the question

> "is, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected."
>
> Henderson *vs.* Mayor of New York (*supra*).

HENRY E. BODMAN,
Amicus Curiæ.

ALEXIS C. ANGELL,
HERBERT E. BOYNTON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 50.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, DEFENDANT IN ERROR.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

HENRY E. BODMAN,
Attorney for International Transit Company, Defendant in Error in No. 749, October, 1912, Term.

ALEXIS C. ANGELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 50.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, DEFENDANT IN ERROR.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

Permission is requested to file in this case a brief as *Amicus Curiæ* for the following reasons:

This case involves the constitutionality of a State law and certain resolutions of a local municipality enacted thereunder, regulating the rates of fare upon a ferry over the Hudson River. Case Number 749, present term, entitled International Transit Company *vs.* City of Sault Ste. Marie *et al.*, involves the validity of a municipal ordinance regulating rates of fare over the St. Marys River, an international boundary stream. Both cases involve a construction of the same clause of the Federal Constitution. The record in No. 749 has been recently printed, but briefs have not been filed.

In case 749 the City of Sault Ste. Marie seeks to enforce an ordinance prescribing punishment by fine or imprisonment for the owner or officer of any vessel which operates as a ferry from said city to the Canadian shore. The International Transit Company has been granted a license from the Dominion of Canada to operate a steam ferry across this river. That license prescribes the rates of fare, hours of service and the season of the year during which the ferry shall be operated. The license required by the city of Sault Ste. Marie conflicts with the Canadian license in each of these particulars.

After an examination of the briefs filed in this case (No. 50), we feel that there are important considerations and some authorities which have not been called to the court's attention, and we therefore desire to file a brief in support of the exclusive control of Congress over this subject.

Respectfully submitted,

HENRY E. BODMAN,
Attorney for International Transit Company, Defendant in Error in No. 749, October, 1912, Term.

ALEXIS C. ANGELL,
Of Counsel.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 50. Argued November 13, 1912.—Decided February 24, 1913.

Congress, by passing the Act to Regulate Commerce, has taken control of interstate railroads, and having expressly included ferries used in connection therewith, has destroyed the power of the States to regulate such ferries. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, distinguished.

Quære: Whether *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, overruled *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

An assertion of power by Congress over a subject within its domain must be treated as coterminous with its authority over the subject, and leaves no element of the subject to control of the State.

The operation at one time of both the power of Congress and that of the State over a matter of interstate commerce is inconceivable; the execution of the greater power takes possession of the field and leaves nothing upon which the lesser power can operate.

No portion of the business of a ferry which is part of an interstate railway is under the control of the State; and so *held* that the state authorities have no power to regulate the fare of passengers, whether railroad passengers or not, on the ferry between Weehawken, New Jersey, and New York City, known as the West Shore Ferry and operated by the New York Central & Hudson River Railroad.
76 N. J. L. 664, reversed.

THE facts, which involve the constitutionality under the commerce clause of an ordinance of Hudson County, New Jersey, fixing rates of ferriage across the Hudson river to New York City on the ferry operated by the New York Central & Hudson River Railroad as lessee of the West Shore Railroad Company, are stated in the opinion.

Mr. Albert C. Wall and *Mr. Frank Bergen*, with whom *Mr. James B. Vredenburgh* and *Mr. Thomas Emery* were on the brief, for plaintiff in error:

The regulation of the rates and fares for transportation via these ferries is inoperative because it conflicts with the commerce clause of the Constitution of the United States. *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204.

Commerce national in character is for Congress to regulate. Non-action implies it shall be unregulated. *Wabash Railway* v. *Illinois*, 118 U. S. 557.

The *Covington Bridge Case* has been cited many times by the court. See *The Lottery Case*, 188 U. S. 352; *The Gloucester Ferry Case*, 114 U. S. 196; *Hanley* v. *Kansas City Ry. Co.*, 187 U. S. 617; *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454.

While *Chosen Freeholders* v. *State*, 3 Zab. 206, affirmed, 4 Zab. 718, purports to sustain the right and power of the state authorities to regulate the rates and fares chargeable for interstate ferry transportation, the cases cited as authority for the conclusion there announced did not involve and were not authoritative upon the point decided, and the absence of Federal legislation upon the

subject was superseded by the act of Congress of 1866, ch. 124, and of 1887, ch. 104, regulating interstate transportation. *People* v. *Babcock*, 11 Wend. 586; *Gibbons* v. *Ogden*, 9 Wheat. 203; *Smith* v. *Turner*, 7 How. 393; *Cooley* v. *Board of Wardens*, 12 How. 319, do not support the conclusion of that case.

Congress has legislated concerning ferries operated in connection with railroads. See § 1, Int. Comm. Act of February 4, 1887.

The Hepburn Amendment of 1906 leaves this language unchanged.

The railroad company has filed a copy of its tariff with the Commission.

By the requirement of the act of Congress of the filing of this tariff, and the filing of the tariff in obedience thereto, the tariff became a law governing the transportation precisely as if the tariff itself had been enacted by Congress in the same words and figures. *Gulf, Colorado & Santa Fe R. Co.* v. *Hefley & Lewis*, 158 U. S. 98; *Texas & Pacific R. Co.* v. *Dryden*, 202 U. S. 242; *Missouri Pacific R. Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 623; *Poor* v. *C., B. & Q. R. Co.*, 12 I. C. C. Rep. 418, 422; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80.

The exercise of the power which the Board of Freeholders here asserts is in conflict with the exclusive power of regulation of the same subject-matter by Federal authority. *Sinnott* v. *Davenport*, 22 How. 227.

The ferryboats are subjects of admiralty jurisdiction. *The St. Louis*, 48 Fed. Rep. 312; *Railroad Co.* v. *Richmond*, 19 Wall. 584; *Bowman* v. *Chi. & N. W. Ry. Co.*, 125 U. S. 465, 484; *Illinois Cent. R. R. Co.* v. *Illinois*, 163 U. S. 142.

The resolutions contain no provision in respect of the time at which they are to go into effect.

Obedience thereto would have been violative of the express inhibitions of the interstate commerce acts and

subjected the railroad company to the penalties therein prescribed in respect of such violation.

Exercise by the State of its power to create corporations and confer upon them charter powers to maintain and operate instrumentalities of interstate transportation does not draw to the State the power of regulation of the rates of fares or tolls for such transportation.

Considering the ferry as the landing, the license and regulation of its maintenance and operation may be of state cognizance, and nevertheless, if the ferry be interstate the ferriage fare is the subject of United States governance.

The Board of Freeholders of the County of Hudson has not the power to fix the rates of ferriage of foot-passengers on these ferries over the Hudson river, from New York to New Jersey.

Mr. E. Parmalee Prentice, with whom *Mr. John Griffin* and *Mr. George Welwood Murray* were on the brief, for defendant in error:

The resolutions of the Board of Freeholders are not invalid as a regulation of commerce among the States.

Federal power over commerce among the States is exclusive only in matters of general concern.

In all local matters state statutes are valid until superseded by Congress. *Cooley* v. *Port Wardens*, 12 How. 310; *Mobile* v. *Kimball*, 102 U. S. 691, 702; *Atlantic &c. Company* v. *Philadelphia*, 190 U. S. 160; *Bowman* v. *Railroad Co.*, 125 U. S. 465, 507; *Leisy* v. *Hardin*, 135 U. S. 100; *Stoughtenburgh* v. *Hennick*, 129 U. S. 141; *Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Robbins* v. *Taxing District*, 120 U. S. 489; *Wabash Railway* v. *Illinois*, 118 U. S. 557; *Morgan* v. *Louisiana*, 118 U. S. 455; *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 210; Willoughby on the Fed. Const., § 309.

The power to regulate commerce is given to Congress,

not to the courts. The question whether a particular statute of a State is prohibited by congressional silence, is a question for Congress. State laws should not be held void except in cases so clear that Congress could not overrule the judicial decision. Thayer, Cases on Const. Law, 2190–2191.

Regulation of ferry rates is a matter of local concern within state jurisdiction.

The States always have regulated ferriage alike over intrastate and boundary streams.

The existing statutes under which the States now regulate ferriage over intrastate and boundary streams support this proposition.

The subject is one which demands intimate knowledge of local conditions. State legislatures have never been able to deal with ferriage by general law, and have turned the subject over to local town and county authorities. It would be impossible for Congress to perform the work now done by supervisors, county commissioners, boards of freeholders, etc. Vermont Act of Feb. 27, 1787; Session Laws, p. 70.

The decisions of this court and of the state courts support the existing practice which recognises state jurisdiction.

A practical and long-continued construction of the Constitution by the States and by Congress is conclusive in this court. *Stuart* v. *Laird*, 1 Cranch, 299; *License Cases*, 5 How. 507, 607; *Conway* v. *Taylor*, 1 Black, 603; *Carroll* v. *Campbell*, 108 Missouri, 550, 564–565.

This practice, continued now for an additional half-century, is no less conclusive in the case at bar. Unless this rule be followed and the course of governmental administration by other branches of government and by the States be recognized, the separation of powers, and government by three coördinate departments would be impossible.

Regulation of ferries on intrastate and boundary streams was, until 1885, considered a matter of state police jurisdiction beyond Federal authority. *Gibbons* v. *Ogden*, 9 Wheat. 1. (See Mr. Webster's statement on pp. 18, 20); *Conway* v. *Taylor*, 1 Black, 603; *Fanning* v. *Gregoire*, 16 How. 524; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, aff'g 102 Illinois, 560; *Mills* v. *St Clair County*, 2 Gilm. (Ill.) 197; aff'd 8 How. (U. S.) 569; *People* v. *Babcock*, 11 Wend. 586; *Ferry Co.* v. *United States*, 5 Blatchf. 198; *Chilvers* v. *People*, 11 Michigan, 43; *Marshall* v. *Grimes*, 41 Mississippi, 27; *Mayor &c.* v. *Longstreet*, 64 How. Pr. 30; Gould on Waters, § 35.

The decision of the *Gloucester Ferry Case*, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute.

The legal definition of a ferry refers to the point of departure as the situs of the ferry. The ferry franchise consists in the right of transporting from that point. *Conway* v. *Taylor*, 1 Black, 603; *Memphis* v. *Overton*, 3 Yerg. (Tenn.) 387, 390; *State* v. *Faudre*, 54 W. Va. 122; *Power* v. *Village of Athens*, 99 N. Y. 592; Massachusetts, Act of 1641, Laws 1792–1800, p. 965; West Virginia Code, 1906, Chap. 44, § 15.

Under this definition no conflict of laws can arise upon boundary streams, for a municipality or State upon one side of the stream has complete control of ferriage from its own shore, and cannot interfere with ferriage from the opposite shore.

The franchise to leave a State comes from state law, which imposes also the duty of the carrier to receive, carry and deliver. *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 394; *Bowman* v. *Chicago &c. Railway*, 115 U. S. 611, 615.

The Constitution does not confer the right of intercourse between State and State. *Gibbons* v. *Ogden*, 9 Wheat. 211; Federal Common Law and Interstate Carriers, 9 Columbia Law Rev. 375; Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 23–37; 124–130; *Re Transportation of Fruit*, 10 I. C. C. Rep. 360.

Some recent cases suggest that there is also a Federal right to engage in interstate commerce, but this proposition has never been advanced without dissent, and in any event does not deny the right derived from state law. The state franchise is the historic right upon which the common law of carriers is built. *Crouch* v. *London & N. W. Ry.*, 14 C. B. 255.

The privilege of keeping a ferry over boundary streams, with the right to take toll for passengers and freight, is grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. *Gloucester Ferry Case*, 114 U. S. 196, 217; *State* v. *Faudre*, 54 W. Va. 122; *Ferry Co.* v. *Russell*, 52 W. Va. 356; *Cross* v. *Hopkins*, 6 W. Va. 323; *Carroll* v. *Campbell*, 108 Missouri, 550; *State* v. *Sickmann*, 65 Mo. App. 499; *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Texas, 480; *Parsons* v. *Hunt*, 98 Texas, 420; *Nixon* v. *Reid*, 8 So. Dak. 507; *Hatten* v. *Turman*, 123 Kentucky, 844.

The majority opinion in the *Covington Bridge Case*, 154 U. S. 204, considered in connection with the facts before the court, announced no new rule.

The cases which recognize state power to regulate ferries over boundary streams are still authoritative. *Williams* v. *Wing*, 177 U. S. 601.

Louisville Ferry Case, 188 U. S. 385, approves *Conway* v. *Taylor*, 1 Black, 603. See, also, *St. Clair County* v. *Transfer Co.*, 192 U. S. 454; *Burlington &c. Ferry Co.* v. *Davies*, 48 Iowa, 133; *Phillips* v. *Bloomington*, 1 Greene (Iowa), 498, 502; *Bowman* v. *Walthen*, 2 Mo-

Lean, 370; *Challiss* v. *Davis*, 56 Missouri, 25; *Columbia &c. Bridge Co.* v. *Geisse*, 38 N. J. L. 39; *Gear* v. *Bullerdike*, 34 Illinois, 74.

The second resolution, regulating rates for a round trip starting from the New Jersey side, is within the jurisdiction of New Jersey. *State* v. *Sickmann*, 65 Mo. App. 499.

There is no Federal statute which supersedes state jurisdiction to regulate ferries.

The New Jersey courts have construed the regulations involved in the case at bar as applying only to such ferry service as is disconnected from railroad transportation.

The distinction between ordinary ferriage and ferriage which is connected with railroad transportation is well recognized. Interstate Commerce Act, § 1; *St. Clair County* v. *Transfer Co.*, 192 U. S. 454.

The construction of a state law by the state courts is accepted in this court as final. *Collins* v. *Texas*, 223 U. S. 288; *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612; *Louisville &c. R. Co.* v. *Mississippi*, 133 U. S. 587; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Randall* v. *Brigham*, 7 Wall. 523; *Gut* v. *State*, 9 Wall. 35; *Richmond* v. *Smith*, 15 Wall. 429; *Leffingwell* v. *Warren*, 2 Black, 599.

The Interstate Commerce Act is not involved.

The statute applies only to transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common control.

Ferriage disconnected from railroad transportation is not affected. *Goodrich Co.* v. *Int. Com. Comm.*, 190 Fed. Rep. 943; *Int. Com. Comm.* v. *Goodrich Co.*, 224 U. S. 194.

Federal statutes concerning enrollment and inspection of vessel, licensing officers, etc., are not involved. *Conway* v. *Taylor*, 1 Black, 603; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Mayor &c.* v. *Starin*, 106 N. Y. 1; *Mayor &c.* v. *Longstreet*, 64 How. Pr. 30; *Midland Ferry*

Co. v. *Wilson*, 28 N. J. Eq. 537; *Carroll* v. *Campbell*, 108 Missouri, 550, 562–563; *Marshall* v. *Grimes*, 41 Mississippi, 27; *People* v. *Babcock*, 11 Wend. 586; *Chilvers* v. *People*, 11 Michigan, 43.

These statutes govern all boats navigating public waters of the United States, whether crossing state lines or not. To give them the effect for which counsel contend would deprive the States of all power over ferries—even across intrastate streams.

The Federal statute of 1866 is not involved.

The history of the statute as well as its express provisions show that, like the Interstate Commerce Act, this is a railroad statute. It has been in force forty-six years, and has never been applied to ferriage disconnected from railroad transportation. Federal Power over Carriers and Corporations (Macmillan, 1907), pp. 95, 209.

The rates established by the Board of Freeholders are not invalid as taking the property of plaintiff in error without compensation.

Argument supporting this proposition will be based upon the facts shown in the record.

The rates have been in existence for several years, and should not now be disturbed without considering the results of this practical test. *Willcox* v. *Gas Company*, 212 U. S. 19, 44.

Mr. Henry E. Bodman, by leave of the court, filed a brief as *amicus curiæ*. *Mr. Alexis C. Angell* and *Mr. Herbert E. Boynton* were on the brief.

Mr. Chief Justice White delivered the opinion of the court.

The rails of the main line of the West Shore Railroad Company extend from Buffalo to Albany, New York, and beyond through the State of New York into New Jersey to the terminus of the road at Weehawken on the west

bank of the Hudson river. From Weehawken steam ferries known as the West Shore Railroad ferries are operated over the river to several terminal points in New York City for the purpose of carrying railroad passengers and traffic from Weehawken to New York and from New York to Weehawken. Although these ferries are known as West Shore Railroad ferries and are operated as railroad ferries, their business is not limited to incoming persons or traffic carried over the lines of the railroad or to persons or traffic conveyed from New York to Weehawken to be transported from there over the railroad. Indeed, from both directions a very large number of persons besides considerable traffic "constantly move to and fro between the two States, not having used or intending to use the lines of the West Shore Railroad."

In 1905 the Board of Chosen Freeholders of Hudson County, New Jersey, adopted two ordinances, one fixing the rate for foot passengers ferried from New Jersey to New York and the other for a round trip commencing on the New Jersey shore, which rates were applicable to the ferries in question. The New York Central & Hudson River Railroad, engaged as a lessee in operating the lines of the West Shore Railroad and its railroad ferries, commenced this proceeding to prevent the enforcement of the rates fixed by the ordinances. The contention was that the ordinances were an unwarranted interference with the interstate business of the company and that the enforcement of the ordinances would constitute a direct burden on interstate commerce, which could not be done consistently with the Constitution. The Supreme Court of New Jersey maintained the contentions of the railroad company. The Court of Errors and Appeals reversed the judgment of the Supreme Court. 76 N. J. Law, 664. The case is now here, the writ of error having been directed to the Supreme Court, to which the record was remitted from the Court of Errors and Appeals.

At the outset it is to be observed that the contentions pressed in argument by both parties take a wider range than the necessities of the case require. We make a very brief reference to certain decisions of this court referred to in argument by both parties in order that they may aid us to plainly mark the boundaries of the real issues required to be decided, thus enabling us to put out of view irrelevant considerations and confine our attention to things essential.

Fanning v. *Gregoire*, 16 How. 524, required a consideration of the right of the legislature of Iowa to authorize a ferry across the Mississippi river at Dubuque. Without going into details it suffices to say that the subject was elaborately considered and the power of the State to grant the ferry right was sustained. In *Conway* v. *Taylor's Executors*, 1 Black, 603, the right of the State of Kentucky to grant franchises for ferrying across the Ohio river, was considered and the power was upheld, the general reasoning stated in *Fanning* v. *Gregoire* being reiterated and approved. It is undoubtedly true that in the course of the reasoning of both the cases just referred to expressions were made use of which give some support to the view that the power to regulate ferriage, even as to a stream bounding two States, was purely local, not transferred by the States to Congress, and therefore not within the grant of power to Congress to regulate commerce.

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196, concerned the validity of a tax imposed by the State of Pennsylvania on a ferry company operating between Gloucester, New Jersey, and the city of Philadelphia. The tax was resisted on the ground that it was a direct burden on interstate commerce and therefore void as an interference with the power of Congress to regulate commerce. The contention was sustained. The whole subject of ferriage was elaborately considered, and in the course of the opinion it was expressly declared, after

considering the decisions in *Fanning* v. *Gregoire* and *Conway* v. *Taylor's Executors*, that ferriage over a stream constituting a boundary between two States was within the grant to Congress to regulate commerce, and therefore not subject to be directly burdened by a State. It was also, however, held that in view of the character of such ferries and the diversity of regulation which might be required, the right to regulate them came within that class of subjects which although within the power of Congress the States had the right to deal with until Congress had manifested its paramount and exclusive authority.

In *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, the right of the State of Kentucky to impose tolls for use of a bridge across the Ohio river, was challenged on the ground that the State had no authority to fix the tolls, because to do so was the assertion of a power to regulate commerce and therefore was an interference with the exclusive power of Congress on that subject. The tolls were held to be invalid. The opinion beyond question reasserted the principle enforced in the *Gloucester Ferry Case* that the movement across a stream, the boundary between two States, was within the grant of power to Congress to regulate commerce and therefore, generically speaking, not subject to the exertion of state authority. Indeed, in view of the fact that there was no act of Congress dealing with the subject of the tolls which were under review in the *Covington Case*, it is true to say that there are expressions in the opinion in that case which have been considered, whether rightly or wrongly we do not feel called upon to say, as qualifying or overruling the conclusion expressed in the *Gloucester Case* as to the power of a State to regulate ferries upon a stream bordering two States until Congress had manifested its purpose to exert its authority over the subject.

In *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454, the question considered was the liability of the

Transfer Company to penalties imposed by the County of St. Clair, a municipal corporation of the State of Illinois, for having failed to obtain a license "for carrying on a ferry for transferring railroad cars, loaded or unloaded, over the county of St. Clair in Illinois to the Missouri shore and from the Missouri shore to the county of St. Clair." It was decided that there was no liability for the penalty (a) because the business of transferring freight cars in the sense disclosed was not ferriage in the proper meaning of that word, and was the transaction of interstate commerce not in any view subject to state control; and (b) because the particular ordinance relied upon as the basis for imposing the penalty was void because of provisions discriminating against interstate commerce which it contained. The cases of *Fanning* v. *Gregoire*, *Conway* v. *Taylor's Executors*, *Gloucester Ferry Co.* v. *Pennsylvania* and *Covington Bridge Co.* v. *Kentucky* were referred to. It was expressly declared in view of the special grounds upon which the case was decided that it was unnecessary to consider whether the decision in the *Covington Bridge Case* had established the doctrine that the interstate business of ferrying over navigable rivers bordering two States was exclusively within the authority of Congress to regulate, and therefore was not, as declared in the *Gloucester Ferry Case*, subject to state regulation until Congress had exerted its authority over the matter.

In the light of this statement we come to state the contentions of the parties. The plaintiff in error insists, not following the exact order of its argument, *a*, that the assailed ordinances are repugnant to the commerce clause because Congress has legislated concerning railroad ferries and thereby manifested its purpose that there should be no longer room for the exertion of state power on the subject; and, *b*, that if this is not so it is now necessary to pass on the question reserved in the *St. Clair Case*, and to decide that the ruling in the *Covington Bridge Case*

affirmatively established that interstate ferriage like that here in question is so absolutely within the power of Congress as to exclude even in case of the inaction of Congress the presumption of a license for the exercise of state power. On the other hand, the argument for the defendant in error is this: That the carrying on of the business of ferriage on navigable rivers constituting a boundary between States is not interstate commerce, that the power to regulate it was not surrendered by the States and consequently no authority was given over the subject to Congress. This is sought to be shown by a copious review of adjudged cases, and by an analysis of what it is urged was the clear intendment of the opinion in *Gibbons* v. *Ogden*, especially as elucidated by the opinions in *Fanning* v. *Gregoire* and *Conway* v. *Taylor's Executors*. It is not denied that these theories are directly contrary to the ruling in the *Gloucester Ferry Case*, but it is urged that that case for the first time announced the doctrine of a national power over interstate ferriage and therefore practically amounted to making a new constitutional provision on the subject. Obviously, however, the views just stated are advanced in a mere academic sense, since the argument admits that the ruling in the *Gloucester Ferry Case* is now conclusive and has settled the significance of the Constitution contrary to the views mentioned. Thus, at the very outset of the argument, after stating and elaborating the theory of exclusive state power over interstate ferriage, it is said: "The decision of the *Gloucester Ferry Case*, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute." Again, after copiously reiterating the conceptions as to the novelty of the ruling in the *Gloucester Ferry Case* and its assumed

conflict with what had gone before, it is said: "The result of the *Gloucester Ferry Case*, therefore, with the other cases which have followed, has probably been to so extend the Federal authority over interstate ferriage as to bring the subject within the concurrent jurisdiction of Congress and of the States. It is a concurrent jurisdiction only, however, which has been established. In the absence of Federal legislation the States have all the power that they have been accustomed to exercise." Thus conceding the controlling force of the *Gloucester Ferry Case* and therefore not questioning the power of Congress which that case upheld, it is urged that the *Covington Bridge Case* should not be now held to have overruled or qualified the *Gloucester Ferry Case* so as to exclude the States from any right to regulate interstate ferriage before and until Congress has manifested its intention to exert its authority by dealing with the subject. Upon the assumption thus stated it is insisted that the court below rightly upheld the assailed ordinances because there has been no action by Congress exerting its authority over the subject with which the ordinances deal and therefore no room for the contention that it was not within the power of the State to enact them.

It is therefore apparent that the contentions of the plaintiff in error primarily invoke only the controlling effect of the ruling in the *Gloucester Ferry Case*, and insist that there has been action by Congress which destroys the presumption of authority in the State to act. It follows that the proposition that the *Covington Bridge Case* overruled the *Gloucester Ferry Case* is merely subordinate, and need not be considered unless it becomes necessary in consequence of an adverse ruling on the primary contention concerning the application of the *Gloucester Ferry Case*.

It is equally clear that the contention of the defendant in error as to the absence of all power in Congress over

interstate ferries is merely academic. From this it necessarily arises that the only ground relied upon to sustain the judgment below is the ruling in the *Gloucester Ferry Case*, and the further proposition that there has been no action of Congress over the subject of the ferriage here involved which authorizes the holding that state power no longer obtains. As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily at least, put out of view and the assertion on the other of an absolutely exclusive state power may also be eliminated from consideration because not relied upon or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the *Gloucester Ferry Case*, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the State of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the first section of the Act to Regulate Commerce (act of February 4, 1887, c. 104, 24 Stat. 379), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that "the term railroad as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease. . . ." The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not ex-

tend to the subject embraced by the ordinances. But as all the business of the ferries between the two States was interstate commerce within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a State to regulate interstate ferriage exists "only in the absence of Federal legislation" and at the same time to assert that the state and Federal power over such subject is concurrent is a contradiction in terms. But this view has been so often applied as to cause the subject to be no longer open to controversy. *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers' Elevator Company*, 226 U. S.

426. Because in the *St. Clair Case*, *supra*, it was decided that a particular character of transportation of interstate commerce was not ferriage and not within state power, even where there had been no action by Congress, affords no reason for in this case extending state authority to a subject to which, consistently with the action of Congress, it cannot be held to apply.

The judgment of the Supreme Court of the State of New Jersey will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.